Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

JOSEPH D. KOUTNIK,

Petitioner,

v.

LEBBEUS BROWN, GERALD A. BERGE, AND MATTHEW J. FRANK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 27, 2007

QUESTIONS PRESENTED

This case involves a prisoner's attempt to send outgoing mail to a retail publication and the State's decision to censor that mailing because the prisoner used a swastika symbol as part of a political message criticizing the prison system.

1. What is the correct First Amendment standard of review for cases involving censorship of outgoing prisoner mail under *Thornburgh v. Abbott*, 490 U.S. 401 (1989) and *Procunier v. Martinez*, 416 U.S. 396 (1974)?

2. Does the First Amendment permit censorship of a prisoner's outgoing mail on general rehabilitative grounds?

PARTIES TO THE PROCEEDING

The parties below were (1) Joseph D. Koutnik, an inmate incarcerated in the State of Wisconsin and, at all times relevant hereto, at the Wisconsin Secure Program Facility and (2) Lebbeus Brown, a corrections officer at the Wisconsin Secure Program Facility, Gerald A. Berge, the Warden at the Wisconsin Secure Program Facility, and Matthew J. Frank, the Secretary of the Wisconsin Department of Corrections.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF FACTS 2
Reasons for Granting the Writ 5
I. Certiorari Should Be Granted Because There Is Substantial Conflict In The Courts Of Appeals Concerning The First Amendment Standard Of Review Regarding Censorship of Outgoing Prisoner Mail. 6
A. *Thornburgh* Did Not Establish A Clear First Amendment Standard Of Review For Adjudication Of Outgoing Mail Censorship. 7
B. The Courts Of Appeals Follow At Least Three Inconsistent Standards of Review Regarding Outgoing Mail Censorship. 9
1. *Thornburgh* Possibly Reversed *Martinez.* 9
2. *Thornburgh* Possibly Restated *Martinez.* 10
3. *Thornburgh* Possibly Preserved *Martinez.* 11
II. Certiorari Should Be Granted To Resolve Whether The First Amendment Permits Censorship Of A Prisoner's Outgoing Mail On General Rehabilitative Grounds. 12
A. *Martinez* Held That Censorship Of Outgoing Prisoner Mail Is Generally Unnecessary To Further Inmate Rehabilitation 12

B. The Seventh Circuit Decision Exacerbates An Existing Circuit Split Over Whether General Rehabilitation Can Justify Censorship Of Prisoner Speech. 14

TABLE OF APPENDICES

Appendix A -- Opinion of the United States Court of Appeals for the Seventh Circuit Dated and Filed August 8, 2006..... 1a - 13a

Appendix B -- Opinion and Order Of the United States District Court for the Western District of Wisconsin Dated and Filed June 22, 200514a - 35a

Appendix C -- Order of the United States Court of Appeals for the Seventh Circuit Denying Petition for Rehearing Dated and Filed November 30, 2006.....36a - 37a

Appendix D -- Selected Regulatory Provisions of the Wisconsin Administrative Code for the Department of Corrections .....38a - 39a

Appendix E -- Mr. Koutnik's Censored Mailing.....40a - 43a

Appendix F -- Notice of Non-Delivery of Mail.....44a

Appendix G -- Selected Portions of First Affidavit of Joseph D. Koutnik In Support of Summary Judgment Motion, Dated March 8, 2005.....45a - 46a

Appendix H - Selected Portions of Plaintiff Koutnik's Response to Defendants' Proposed Findings of Fact Dated March 28, 2005.....47a - 48

TABLE OF AUTHORITIES

CASES

Altizer v. Deeds, 191 F.3d 540 (4th Cir. 1999) 8

Amatel v. Reno, 156 F.3d 192 (D.C. Cir. 1998) 14-15

Bell-Bey v. Williams, 87 F.3d 832 (6th Cir. 1996) 11

Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993) 9

Nasir v. Morgan, 350 F.3d 366 (3d Cir. 2003) 10

Ortiz v. Fort Dodge Correctional Facility, 368 F.3d 1024 (8th Cir. 2004) 10

Pell v. Procunier, 417 U.S. 817 (1974) 5

Procunier v. Martinez, 416 U.S. 396 (1974) 5-7, 12-14

Ramirez v. Pugh, 379 F.3d 122 (3d Cir. 2004) 15

Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971) 15

Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994) 10

Thornburgh v. Abbott, 490 U.S. 401 (1989) 5, 8-12

Treff v. Galetka, 74 F.3d 191 (10th Cir. 1996) 11

Turner v. Safley, 482 U.S. 78 (1987) 7-8

Witherow v. Paff, 52 F.3d 264 (9th Cir. 1995) 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 1

U.S. Const. amend. XIV, § 1 1-2

42 U.S.C. § 1983 ..... 2, 3

28 U.S.C. § 1254 1

28 U.S.C. § 1331 3

Wis. Admin. Code § 303.20 3

MISCELLANEOUS

Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW (3d ed. 1999) 13

PETITION FOR A WRIT OF CERTIORARI

Joseph D. Koutnik respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

This petition seeks the review of the decision of the United States Court of Appeals for the Seventh Circuit in *Koutnik v. Brown*, reprinted at Pet. App. A, 1a - 13a, and published at 456 F.3d 777. The Seventh Circuit affirmed an order issued by the United States District Court for the Western District of Wisconsin (per Crabb, C.J.) in the same matter.

The District Court opinion and order granting defendants' summary judgment motion is reprinted at Pet. App. B, 14a - 35a and is unreported. The Seventh Circuit order denying rehearing and rehearing *en banc*, with three judges dissenting, is reprinted at Pet. App. C, 36a - 37a and is not otherwise published.

JURISDICTION

The Seventh Circuit entered judgment on August 8, 2006. Mr. Koutnik's petition for rehearing and rehearing *en banc* was denied on November 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment of the United States Constittuion provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The pertinent regulatory provisions of the Wisconsin Administrative Code are reprinted in an appendix to this petition. Pet. App. D, 38a - 39a.

STATEMENT OF FACTS

In December 2002, Petitioner Joseph D. Koutnik ("Mr. Koutnik"), an inmate at the Wisconsin Secure Program Facility (the "WSPF"), attempted to send a letter and some of his own political drawings to Northern Sun Merchandising ("Northern Sun"), a retail catalog that merchandises t-shirts, posters, and other politically-themed materials. Pet. App. E, 40a - 43a. One of Mr. Koutnik's drawings was a cartoon swastika filled with prison bars, with the captions, "Department of Corruptions" and "Keeping Kids in Kages." *Id.* at 43a. His mailing also included a cover letter and other drawings with similar captions. *Id.* at 41a - 42 a. In his letter, Mr. Koutnik wrote that he "noticed that prison reform is not as well represented as is needed and [I] am therefore including some of my ideas you should consider using." *Id.* at 41a.

WSPF prison officers (the "State") seized and destroyed Mr. Koutnik's outgoing mail to Northern Sun. Pet. App. F, 44a. The "reason for non-delivery" was that the mail "concern[ed] an activity which, if completed, would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections." *Id.* The Notice also stated that the "[d]rawing of swastika violates DOC 30320 Warning issued." *Id.*[1]

After exhausting his administrative remedies, Mr. Koutnik brought a *pro se* civil rights claim pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 alleging that the censorship of his outgoing mail violated his constitutional rights under the First and Fourteenth Amendments. Mr. Koutnik stated that he had intended the Swastika Drawing solely as a political statement comparing the state prison system to the Nazi "system of warehousing Jews, Slavs, and other 'undesirables' in concentration camps." Pet. App. G, 46a. Mr. Koutnik also denied that he was promoting white supremacist beliefs and stated that, as a person of Slavic descent, he abhors Nazis. *Id.*

The State contended that its censorship was justified because the Swastika Drawing was incompatible with Mr. Koutnik's general rehabilitative interests, and the District Court granted summary judgment on that basis. Pet. App. B, 31a - 32a. In reaching this determination, the District Court deferred to the conclusions of Lebbeus Brown ("Officer Brown"), a corrections officer and defendant in this case,

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[1] The notation "DOC 30320" refers to Wisconsin Administrative Code § 303.20, which prohibits inmates from "participating in any activity with an inmate gang" or "possess[ing] any gang literature, creed, symbols, or symbolisms." Pet. App. B, 19a - 20a; Wis. Admin. Code § 303.20(3).

who contended that "allowing plaintiff to merchandise political messages that contained symbols associated with white supremacist groups interfered with the facility's interest in rehabilitating plaintiff." *Id.* at 31a.

The District Court granted summary judgment to the State on this rehabilitative ground even though it found that Mr. Koutnik was not "affiliated in any way with the Ku Klux Klan or Nazi groups." *Id.* at 15a. The District Court concluded that, even though Mr. Koutnik was not a white supremacist, "[p]rison officials have an interest in suppressing *all* gang-related activity and expression, not merely symbols that associate an inmate with one specific gang." *Id.* at 33a. The District Court further reasoned that even though Mr. Koutnik only intended to make a political statement, censorship was justified simply "because of the presence of the swastika and the coded reference to the Ku Klux Klan." *Id.* at 32a

Mr. Koutnik filed a *pro se* appeal. Pet. App. A, 1a - 13a. The Seventh Circuit did not accept the District Court's premise that the State was justified in suppressing *all* gang-related symbols, even those without a connection to an existing inmate gang or group. *Id.* at 7a ("Strictly read, DOC § 303.20 would not authorize prison administrators to ban the symbolism of white supremacy groups if there were no inmate groups associated with that cause."). Moreover, no white supremacist inmate gangs have ever been identified as existing at WSPF, and Mr. Koutnik denied that any such "inmate gangs" could exist because "everybody is segregated" at WSPF. Pet. App. H, 48a. The Seventh Circuit also did not discuss Mr. Koutnik's lack of affiliation with white supremacy gangs or that Mr. Koutnik intended to convey a pro-prison reform political message through his Swastika Drawing.

Instead, the Seventh Circuit affirmed the District Court by concluding that the Swastika Drawing was "an effort to appeal to groups that would hinder, rather than foster, respectful human interaction, both inside and outside of prison," and that Mr. Koutnik's attempt to "market symbols affiliated with racially intolerant groups obviously thwarted the State's legitimate goals" of teaching general civic values, such as racial tolerance and non-violence, to its inmates. *Id.* at 13a. The Seventh Circuit deferred to Officer Brown's assessment that a swastika is a "gang-related symbol" and concluded that "Mr. Koutnik's correspondence was not an effort to establish 'constructive, wholesome contact' with the outside community that would foster successful reintegration into society." *Id.*

After this decision, Mr. Koutnik obtained *pro bono* counsel to file his petition for rehearing, with a suggestion for rehearing *en banc*. The petition for rehearing was denied, with three judges voting to grant the petition for rehearing *en banc*. Pet. App. C., 36a - 37a.

REASONS FOR GRANTING THE WRIT

For over thirty years, the "medium of written correspondence" has offered prisoners an "open and substantially unimpeded channel of communication with persons outside the prison." *Pell v. Procunier*, 417 U.S. 817, 824 (1974). This case presents an important issue for review not only for prisoners, but also for the consequential rights of all American citizens with whom such prisoners might correspond. *See Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

This Court should grant this petition for writ of certiorari to settle a conflict among the Courts of Appeals as to whether and to what extent the First Amendment standard

of review articulated in *Martinez* survived *Thornburgh* as to the censorship of outgoing prisoner mail.

This case also presents the opportunity for this Court to address whether the First Amendment permits censorship of a prisoner's outgoing mail based upon the State's conclusion that the content of the prisoner's speech is inconsistent with the prisoner's general rehabilitative interest.

I. Certiorari Should Be Granted Because There Is Substantial Conflict In The Courts Of Appeals Concerning The First Amendment Standard Of Review Regarding Censorship of Outgoing Prisoner Mail.

This Court granted certiorari in *Martinez* because of the "variety of widely inconsistent approaches" that federal courts had adopted to resolve "the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights." *Martinez*, 416 U.S. at 406. This uncertainty led to the "haphazard" protection of important First Amendment interests, while making it "impossible for correctional officials to anticipate what is required of them," perpetuating "repetitive, piecemeal litigation." *Id.* at 407.

This same inconsistency has reemerged in the federal courts in the wake of *Thornburgh*, which provided commentary as to how *Martinez* should be interpreted. The Courts of Appeals have once again adopted a "variety of widely inconsistent approaches" to the issue of censorship of outgoing prisoner mail to the detriment of First Amendment rights of expression. *Id.* at 406.

A. *Thornburgh* Did Not Establish A Clear First Amendment Standard Of Review For Adjudication Of Outgoing Mail Censorship.

In *Martinez*, this Court held that prison officers could not censor prisoner correspondence with non-prisoners unless a showing was made that the regulation or practice (1) furthered an important state interest, and (2) was "no greater than is necessary or essential to the protection" of that interest. 416 U.S. at 413. Central to the *Martinez* holding was this Court's rejection of "any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners." *Id.* at 409. This Court also recognized that "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, ... censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." *Id.* at 408-09.

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court upheld a restriction on prisoner-to-prisoner correspondence while rejecting a restriction on inmate marriages. *Turner* did not overturn *Martinez*. Instead, *Turner* established a standard of review for speech-restrictive prison regulations that operated only within the prison environment. 482 U.S. at 89. Under *Turner*, such prison regulations would be upheld where they were "reasonably related to [a prison's] legitimate penological interests." *Id.* However, such regulations would not be upheld where the "logical connection" between the regulation and the asserted goal was "so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Further, *Turner* held that the asserted goal must operate "without regard to the content of the expression." *Id.* at 90. One test suggested by *Turner* of whether a "reasonable relationship" existed between a

regulation and a state interest was whether an inmate could "point to an alternative that fully accomodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91.

Because *Turner* "focuses on the reasonableness of the prison official's actions," whereas *Martinez* "focuses on whether the prison official's actions were necessary to further a substantial governmental interest," *Turner* represents a standard of review that is more deferential to the discretion of prison officials than the *Martinez* standard of review. *Altizer v. Deeds*, 191 F.3d 540, 548 n.13 (4th Cir. 1999).

Then came *Thornburgh*. Whereas *Martinez* invalidated regulations that restricted both *incoming* and *outgoing* prisoner mail, *Thornburgh* held that the *Turner* standard of review (which is more deferential to the State) should apply to incoming correspondence, while expressly reserving the heightened *Martinez* standard of scrutiny for outgoing prisoner mail. 490 U.S. at 412 (holding that in cases of outgoing mail censorship, the State should be afforded a "lesser degree of case-by-case discretion" and that "a closer fit between the regulation and the purpose it serves may safely be required"). This Court reasoned that "the implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Id.* at 413.

Thornburgh also included commentary on how federal courts should interpret *Martinez* with regard to outgoing mail censorship:

> We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict "least restrictive means" test. As noted, *Martinez* required no

> more than that a challenged regulation be "generally necessary" to a legitimate governmental interest.

Id. at 411. This language in *Thornburgh* has resulted in a substantial degree of confusion within the Courts of Appeals as to the appropriate First Amendment standard of review to apply to censorship of outgoing prisoner mail.

B. The Courts Of Appeals Follow At Least Three Inconsistent Standards of Review Regarding Outgoing Mail Censorship.

After *Thornburgh*, the Courts of Appeals have followed three inconsistent standards of review: *Thornburgh* either (1) reversed *Martinez*, (2) restated *Martinez*, or (3) fully preserved *Martinez* in the context of outgoing prisoner correspondence.

1. Thornburgh Possibly Reversed *Martinez*.

Despite this Court's emphasis in *Thornburgh* upon the "categorical" distinction between incoming and outgoing mail, some Courts of Appeals have suggested that *Thornburgh* effected a complete reversal of *Martinez*, even in the context of outgoing prisoner mail.

The Fifth Circuit has drawn the inference from *Thornburgh* that *Martinez* is no longer good law, suggesting that, despite this Court's attempt to "draw a distinction between incoming and outgoing mail and . . . preserve the viability of *Martinez* with respect to outgoing mail," *Thornburgh*'s "reading" of *Martinez* "suggests that *Turner*'s 'legitimate penological interest' test would also be applied to outgoing mail." *Brewer v. Wilkinson*, 3 F.3d 816, 824 (5th Cir. 1993) (applying *Turner* in a case of inspection, but not censorship, of outgoing prisoner mail).

The Eight Circuit also interprets *Thornburgh* as having completely reversed *Martinez*, even with regard to censorship of outgoing mail. *Ortiz v. Fort Dodge Corr. Facility*, 368 F.3d 1024, 1026 n.2 (8th Cir. 2004) (noting that while *Thornburgh* "left open the possibility of applying a stricter standard to prison regulations involving outgoing mail," the Eight Circuit should apply a more deferential standard of review under *Turner* to all claims of prisoner mail censorship); *Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) ("[W]e have previously held that claims involving inmate mail--both incoming and outgoing--must be measured against the standard set out in *Turner*.")

2. *Thornburgh* Possibly Restated *Martinez*.

Other courts have interpreted the dicta in *Thornburgh* as restating the second prong of *Martinez* to require only a showing that censorship of outgoing mail was "generally necessary" to protect a legitimate state interest.

The Third Circuit applied a restated *Martinez* standard to a prison policy statement prohibiting outgoing inmate correspondence with former inmates without prior superintendent approval. *Nasir v. Morgan*, 350 F.3d 366, 368 (3d Cir. 2003). The Third Circuit noted that *Thornburgh* "made no judgment as to outgoing mail, and any suggestion that *Martinez* would still apply was dictum." *Id.* at 371. The court noted, however, that "[b]ecause *Thornburgh* holds that *Turner* does not squarely overrule *Martinez* as applied to outgoing mail, we will apply *Turner* to incoming mail and *Martinez* to outgoing correspondence." *Id.* The Third Circuit then took notice of the dictum in *Thornburgh* that reinterpreted the second prong of *Martinez* as not requiring a "least-restrictive means test" and upheld the prison policy statement using a *Turner*-based analysis. *Id.* at 375.

The Sixth Circuit interpreted the dicta of *Thornburgh* as restating the second prong of *Martinez* such that it "requires only that the prison regulation be 'generally necessary' to a government interest." *Bell-Bey v. Williams*, 87 F.3d 832, 838 (6th Cir. 1996). The District Court purported to follow this interpretation of *Thornburgh* in this case. Pet. App. B, 32a.

The Ninth Circuit has also used a modified *Martinez* standard in an outgoing prisoner mail inspection case. *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). The Ninth Circuit emphasized separate dicta in *Thornburgh* which suggested that, although *Martinez* no longer required a "least restrictive means" test, a "closer fit between the regulation and the purpose it serves" should be required in the outgoing prisoner mail context. *Id.* (quotation marks omitted).

3. Thornburgh Possibly Preserved *Martinez.*

Other courts have held that *Thornburgh* had no effect on the rights of prisoners to send outgoing mail to non-prisoners, and that such rights are still "clearly established" under *Martinez*. *Treff v. Galetka*, 74 F.3d 191, 194-95 (10th Cir. 1996). In *Treff*, the Tenth Circuit reviewed a prisoner's claim of outgoing mail censorship under an unmodified *Martinez* standard; it applied the second prong of *Martinez*, which requires that prison censorship be "no greater than necessary or essential to the protection of the particular governmental interest involved." *Id.* at 195. (quotation marks omitted).

In this case, the Seventh Circuit ostensibly applied the original *Martinez* standard and did not cite to *Thornburgh* as having modified this standard. Pet. App. A, 11a. The Seventh Circuit then failed to apply the second prong of *Martinez* and analyze whether the State's censorship in this case was "greater than necessary" to further the state's

rehabilitative interests. *Id.* at 13a (finding only that the censorship "did 'further'" the State's interest in inmate rehabilitation). As a result, the actual standard of review applied by the Seventh Circuit was merely whether the censorship "further[ed]" a legitimate penological goal, without regard to whether the censorship was "reasonable" (*Turner*) or "necessary (*Martinez*) in furtherance of that goal.

This Court should grant the petition for a writ of certiorari, as it did in *Martinez*, to clarify the important First Amendment standard of review concerning censorship of outgoing prisoner mail addressed to non-prisoners.

II. Certiorari Should Be Granted To Resolve Whether The First Amendment Permits Censorship Of A Prisoner's Outgoing Mail On General Rehabilitative Grounds.

This Court should also grant the petition for a writ of certiorari to resolve whether the First Amendment permits prison officers to censor a prisoner's outgoing mail merely because it is allegedly incompatible with the prisoner's general rehabilitative interests.

A. *Martinez* Held That Censorship Of Outgoing Prisoner Mail Is Generally Unnecessary To Further Inmate Rehabilitation.

Martinez held that prisoners retain the First Amendment right to send outgoing mail even if the mailing contains statements that "unduly complain," "magnify grievances," express "inflammatory political, racial, religious or other views," or contain matter that prison officers deem "defamatory" or "otherwise inappropriate." 416 U.S. at 415. *Martinez* further held that a penological interest could be "legitimate" only to the extent it was "unrelated to the suppression of expression." *Id.*

This Court imposed the "no greater than is necessary" second prong of *Martinez* because the invalidated prison regulations "invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." *Id.* at 413, 415. This Court noted that, "[n]ot surprisingly, prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism." *Id.*

Although this Court recognized in *Martinez* that "rehabilitation" could theoretically serve as a legitimate penological objective, this Court concluded that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Id.* at 412. This Court cited to a federal Bureau of Prisons policy statement, which observed that "[c]onstructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process." *Id.* at 412 n.13. This Court also cited another policy guideline from the Association of State Correctional Administrators, which it found "echoe[d] the view that personal correspondence by prison inmates is a generally wholesome activity." *Id.*

Thus, *Martinez* reasoned that censorship of outgoing prisoner mail is generally unnecessary to further inmate rehabilitation, regardless of the content of the mailing itself. Nothing this Court has said since has contradicted that conclusion, and the reasoning of *Martinez* is still valid today. "Punishing people for speech does not discourage the speech; it only drives it underground." 4 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW § 20.6, at 256 (3d ed. 1999); *see Martinez*, 416 U.S. at 426 (recognizing "[t]he harm censorship does to rehabilitation" as inmates withdraw and "become wary of placing intimate thoughts or

criticisms of the prison in letters.") (Marshall, J., concurring) (quotation marks omitted).

Censorship will not induce Mr. Koutnik to forget how to draw a swastika nor would it deter him from drawing a swastika *after* he is released from prison. The State could have easily discovered that there was no rehabilitative reason to censor the Swastika Drawing because Mr. Koutnik did not have ties to white supremacy inmate gangs or hold white supremacist beliefs. Before seizing and destroying the entire mailing, the State could have questioned Mr. Koutnik about the Swastika Drawing, his beliefs on race, his gang history, or even just checked its own records. The State's failure to even attempt to verify its assumptions about the Swastika Drawing suggests that the State's purported rehabilitative goal is exactly the type of pretextual excuse that the second prong of *Martinez* was designed to prevent.

B. The Seventh Circuit Decision Exacerbates An Existing Circuit Split Over Whether General Rehabilitation Can Justify Censorship Of Prisoner Speech.

Certiorari should be granted because the Seventh Circuit's decision exacerbates an existing circuit split between the Third Circuit and the D.C. Circuit over whether a general interest in inmate rehabilitation should serve as a legitimate basis for censorship of prisoner speech.

In *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998), inmates and publishers challenged a federal law (the Ensign Amendment) restricting the Federal Bureau of Prisons from distributing incoming publications containing "sexually explicit material." *Id.* at 194-95. The D.C. Circuit held that "inculcation of values" was a legitimate penological objective and held that Congress reasonably concluded that

allowing inmates to access pornography could stunt their "character growth." *Id.* at 198-99.

Judge Wald dissented, noting that "the assertion of 'rehabilitation' as the reason for impinging on prisoners' First Amendment rights is particularly disconcerting in its potential for abuse." *Id.* at 209. She noted that "undertaking the Herculean task of 'character-molding' is inherently problematic in its First Amendment implications, for it presumably involves casting emerging prisoners in society's own image." *Id.* at 210. Thus viewed, rehabilitation can become "the antithesis of First Amendment freedoms; indeed, '[t]otalitarian ideologies we profess to hate have styled as "rehabilitation" the process of molding the unorthodox mind to the shape of prevailing dogma.'" *Id.* (quoting *Sobell v. Reed*, 327 F. Supp. 1294, 1305 (S.D.N.Y. 1971).

In a similar Ensign Amendment case, the Third Circuit agreed with Judge Wald's dissent in *Ramirez v. Pugh*, 379 F.3d 122 (3d Cir. 2004), and criticized the majority in *Amatel* for "abdicat[ing] their responsibility to scrutinize carefully the government's reasons for infringing that right." *Id.* at 128-29. The Third Circuit concluded that "[t]o say . . . that rehabilitation legitimately includes the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards which the rehabilitative efforts are addressed, would essentially be to acknowledge that prisoners' First Amendment rights are subject to the pleasure of their custodians." *Id.* at 128.

The Seventh Circuit's decision is squarely at odds with *Ramirez* and Judge Wald's dissent in *Amatel*. Further, the Seventh Circuit's decision is inconsistent with *Amatel* because the majority opinion involved a Congressional finding of a rehabilitative interest. 156 F.3d at 202. By

contrast, in Mr. Koutnik's case, the only "finding" made was the conclusory assertion of Officer Brown.

This Court should grant certiorari to review whether the First Amendment permits the censorship of an inmate's outgoing mail based solely on a prison officer's assessment of the inmate's general rehabilitative best interests.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals, Seventh Circuit.
Joseph D. KOUTNIK, Plaintiff-Appellant,
v.
Lebbeus BROWN, Gerald A. Berge, Warden, and Matthew J. Frank, Secretary, Defendants-Appellees.
No. 05-3193.

Submitted March 28, 2006.
Decided Aug. 8, 2006.
Rehearing en Banc Denied Nov. 30, 2006.*

Before RIPPLE, KANNE and SYKES, Circuit Judges.
RIPPLE, Circuit Judge.

Wisconsin prisoner Joseph Koutnik brought this action under 42 U.S.C. § 1983 after an employee of the prison in which he is incarcerated seized an article of his outgoing mail. Mr. Koutnik claims that the Wisconsin regulation relied upon by the defendants to justify the seizure violates the First Amendment on its face and as applied to him; he also claims that the defendants' actions violated his substantive due process rights. The district court dismissed Mr. Koutnik's facial challenge and his due process claim, and it granted summary judgment to the defendants on his remaining First Amendment claim. For the reasons set forth in this opinion, we affirm the judgment of the district court.

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* Judge Flaum took no part in the consideration or decision of the petition for rehearing en banc. Judges Rovner, Wood and Williams voted to grant the petition for rehearing en banc.

I

A.

Mr. Koutnik is confined at the Wisconsin Secure Program Facility. In December 2002, he placed in the outgoing mail a letter addressed to Northern Sun Merchandising ("Northern Sun"), a company that sells politically oriented products, including t-shirts, posters and stickers. Northern Sun invites design proposals for its products and pays royalties if an idea is marketed successfully. Mr. Koutnik's letter encouraged Northern Sun to add communist-themed posters to its product line and also suggested developing a line of small posters targeted at inmates who are prohibited by prison regulations from possessing stickers and large posters. Mr. Koutnik also wrote: "I noticed that prison reform is not as well represented as is needed and am therefore including some of my ideas you should consider using. [L]et me know what you think." R.10, Ex.D. Several designs were included as attachments. One, taking a page to itself, was a drawing of a swastika textured with the image of cell bars. Above the swastika was the slogan "The Department of Corruptions," and below it was the slogan "Keeping Kids in Kages" written with enlarged, stylized capital Ks. *Id.*, Ex.F.

Lebbeus Brown, then a lieutenant at the facility, prevented Mr. Koutnik's letter from being sent. He issued a "Notice of Non-Delivery of Mail," advising Mr. Koutnik that the swastika drawing violated Wisconsin Administrative Code DOC § 303.20. In relevant part, that section provides:

> Any inmate who participates in any activity with an inmate gang, as defined in [§] DOC 303.03(11), or possesses any gang literature,

> creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Wis. Admin. Code DOC § 303.20(3). Lieutenant Brown later would explain that, based on his training and experience, he believes the swastika to be "a symbol of Aryan pride and white supremacy, as well as racial hatred." R.15 at 8. Moreover, in this particular instance, he perceived the capital Ks and the misspelling of "cages" in "Keeping Kids in Kages" as a reference to the Ku Klux Klan. *Id.* at 9. The Klan is not a sanctioned group at the facility, *see* Wis. Admin. Code DOC § 309.365(c)(1), and Lieutenant Brown reasoned that Mr. Koutnik "was identifying with and trying to promote the growth of white supremacy groups while merchandizing white supremacy material," R.15 at 9. To permit such activity, the Lieutenant concluded, would create a security risk by emboldening white-supremacist inmates to spark racial unrest on the assumption that the facility and the Department of Corrections "were associated with and condoned white supremacy activity." *Id.* at 10. Lieutenant Brown also decided that Mr. Koutnik's desire to merchandize his design was also incompatible with the facility's efforts to rehabilitate him, even if the design never were reintroduced into the prison system.

B.

Mr. Koutnik filed the present action in which he alleged that Lieutenant Brown's seizure of the outgoing letter violated both his first amendment and substantive due process

rights. Mr. Koutnik first submitted that the regulation upon which Lieutenant Brown relied, DOC § 303.20(3), is facially overbroad and that the seizure did not have a legitimate penalogical purpose. The district court dismissed the overbreadth challenge at the initial screening required by 28 U.S.C. § 1915A(a),[1] but allowed Mr. Koutnik's as-applied challenge-concerning the use of the regulation to seize his outgoing correspondence-to proceed.

Mr. Koutnik further alleged that the seizure of his letter violated his right to substantive due process. However, the district court took the view that this claim was precluded because the Supreme Court has directed that substantive due process claims be analyzed under the specific provision of the Constitution most relevant to the claim, here the First Amendment. *See Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L.Ed. 2d 114 (1994); *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.Ed. 2d 443 (1989); *see also Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir.2005). Consequently, this claim was dismissed in the court's initial screening order as well.

The district court later granted summary judgment in favor of the defendants, analyzing Mr. Koutnik's remaining first amendment claim under the standard set out in *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L.Ed. 2d 224 (1974). That decision authorizes censorship of outgoing correspondence if justified by a substantial penalogical

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[1] Title 28, § 1915A(a) of the United States Code requires district courts to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." In conducting this review, district courts must identify cognizable claims and dismiss the complaint, or any portion thereof, that fails to state a claim.

interest and if the means employed are no more intrusive than necessary to achieve that goal. *See id.* at 413, 94 S. Ct. 1800. The prison ostensibly had such a purpose, the court reasoned, because institutional security and inmate rehabilitation are legitimate aims. *See Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 41 L.Ed. 2d 495 (1974). However, in addressing each of these purposes, the district court expressed doubt that *outgoing* mail containing a political or racial message constitutes a security risk. *See Martinez*, 416 U.S. at 416, 94 S. Ct. 1800. Accordingly, it rested its grant of summary judgment on its determination that the facility had a substantial interest in rehabilitating Mr. Koutnik and that the censorship of this article of his outgoing mail was a measure that was no more intrusive than necessary to achieve that goal. Even if Mr. Koutnik's intent was solely to criticize the penal system by associating it with a swastika and the KKK, the court reasoned, Lieutenant Brown was entitled to stop the outgoing mail because it contained those references.

II.[2]

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[2] Mr. Koutnik initially argues that the district court erred in dismissing his substantive due process claim. In his complaint, Mr. Koutnik alleged that "his right to Free Speech, Substantive Due Process and Freedom of Expression were violated by Defendants." R.2 at 1. His complaint further alleges that the defendants' acts "violated Koutnik's first and fourteenth amendment rights," that the harms were "based on an unconstitutionally vague and overbroad prison rule" and that the regulation should be declared "unconstitutionally vague and overbroad in that ... it is used to punish protected activity as noted in this case." *Id.* at 4.

As noted above, in evaluating the substantive due process claim, the district court was guided by the Supreme Court's admonition in *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L.Ed. 2d 114 (1994): "When a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due

A.

On appeal, Mr. Koutnik first argues that the district court erred in dismissing his facial challenge to Wisconsin Administrative Code DOC § 303.20(3) at the screening stage. This section prohibits participating "in any activity with an inmate gang" or "possessing any gang ... symbols"; in turn, DOC § 303.02(11) defines "an inmate gang" as "a group of inmates which is not sanctioned by the warden." Mr. Koutnik asserts that, at the Wisconsin Secure Program Facility, there are *no* inmate groups sanctioned by the warden. Therefore, he argues that DOC § 303.20(3) prohibits the possession of symbolism which could be associated with

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process must be the guide for analyzing these claims." *Id.* (internal quotation marks and citations omitted). Because the "Petitioner allege[d] specifically that the actions of the respondents violated his First Amendment rights to free speech and freedom of expression," the district court found it unnecessary to address the claims in terms of substantive due process. R.3 at 6. On appeal, Mr. Koutnik does not contest directly the district court's application of the *Albright* rule; the section of his brief dedicated to his "substantive due process" claim simply expands upon his complaint and asks that the regulation "be declared unconstitutionally vague" and that its application be enjoined. Appellant's Br. at 10.

We believe the district court employed the correct approach. Here, Mr. Koutnik is alleging that the Department of Corrections promulgated a vague and overbroad regulation that was used to punish protected activity; these allegations invoke the protections against government interference with free speech that are guaranteed by the First Amendment. Consequently, it was proper for the district court to evaluate Mr. Koutnik's claims according to a first amendment framework, *cf. Eby-Brown Co., LLC v. Wisconsin Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002) (citing *Albright* and refusing to analyze complaints of unequal treatment as substantive due process claims, as opposed to equal protection claims), and we address Mr. Koutnik's overbreadth and vagueness claims below.

any group.[3]

Mr. Koutnik misreads the provision. The operative section of the administrative code does not prohibit inmates from possessing the symbolism of *any* group, but rather any *inmate* group not approved by the warden. This distinction is significant because it makes the provision quite narrow; indeed, if strictly read, DOC § 303.20 would not authorize prison administrators to ban the symbolism of white supremacy groups if there were no inmate groups associated with that cause. With this understanding of the regulation in mind, we turn to Mr. Koutnik's legal arguments.

To launch a successful overbreadth challenge, a plaintiff must show "that a law punishes a 'substantial' amount of protected free speech." *Virginia v. Hicks*, 539 U.S. 113, 118, 123 S. Ct. 2191, 156 L.Ed. 2d 148 (2003); *see also Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004). We have explained, however, that "the concepts of 'overbreadth' and 'vagueness' in the jurisprudence of the First Amendment were devised in order to prevent the slightest discouragement of free speech, and therefore have only limited relevance to a sphere where the right of free speech is limited." *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986). Prison inmates have limited first amendment rights, *see, e.g., Shaw v. Murphy*, 532 U.S. 223, 228, 121 S. Ct. 1475, 149 L.Ed. 2d 420 (2001) (noting that "the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large"); therefore, "[w]hatever scope overbreadth analysis has in criminal prosecutions ... it has little or none in civil

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[3] We note that Mr. Koutnik forwarded identical vagueness and overbreadth arguments in a separate action; this court rejected those arguments in an unpublished order. *Koutnik v. Brown*, 2006 WL 2053025 (7th Cir. July 24, 2006).

litigation dealing with prisons' internal operations," *Borzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006). This limitation on the overbreadth doctrine grows out of the inherent restrictions on the rights of prisoners and the concomitant special need of prison administrators for flexible regulations. "Some open-ended quality is essential if a prison is to have any guidelines; it is impossible to foresee all literature that may pose a threat to safety and security." *Id.* Given the extremely limited scope of overbreadth analysis in this context, we conclude that any overbreadth in the regulation at issue here "is not 'substantial' in relation to its proper applications." *Id.* The district court correctly dismissed the overbreadth claim pursuant to § 1915A(b)(1).

We turn, then, to Mr. Koutnik's vagueness challenge. [E]ven if a law does not reach a substantial amount of constitutionally protected conduct, it can be found to be impermissibly vague if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner.

Fuller by Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 251 F.3d 662, 666 (7th Cir. 2001). A party raising a facial challenge to a statute or regulation on vagueness grounds "must demonstrate that the law is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). "The nature of the law" also affects the vagueness analysis. *Fuller*, 251 F.3d at 667. Thus, for example, school officials may have greater latitude in fashioning student disciplinary rules because of the "need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational

process." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L.Ed. 2d 549 (1986). Similarly, as we have noted above, "[s]ome open-ended quality is essential if a prison is to have any guidelines; it is impossible to foresee all literature that may pose a threat to safety and security." *Borzych*, 439 F.3d at 392.

In the present context, we believe a reasonable person would understand the regulation to prohibit the symbols employed here, a swastika and the letters "KKK." These symbols have been associated with racist and white supremacist groups for over half of a century-groups, not surprisingly, that are not recognized by the warden. Furthermore, the fact that the regulation provides some latitude to prison officials in defining gang symbols does not render it void for vagueness. Indeed, this court has upheld school regulations prohibiting "gang-like activity" against a vagueness challenge. *See Fuller*, 251 F.3d at 667-68. Given the greater flexibility accorded prison officials to ensure order and safety in a prison population, we do not believe that the regulation fails to inform the inmate population as to what symbols are prohibited. The regulation, therefore, is not unconstitutionally vague.

B.

Mr. Koutnik's remaining first amendment claim is that the statute is unconstitutional as applied to his activity. The district court held, and we agree, that censorship of an inmate's outgoing mail still is scrutinized under the standard espoused in *Martinez*, 416 U.S. at 413, 94 S. Ct. 1800. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996); *Gaines v. Lane*, 790 F.2d 1299, 1304 (7th Cir. 1986). Although *Martinez* later was overturned in part, the Supreme Court specified in doing so that the decision would remain the

standard for cases involving *outgoing* mail. *See Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 104 L.Ed. 2d 459 (1989). Other circuits have applied *Martinez* in that context, and so shall we. *See, e.g., Nasir v. Morgan*, 350 F.3d 366, 371 (3d Cir. 2003) (applying *Martinez* to seizures of outgoing correspondence); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 878 (9th Cir. 2002). *But see Altizer v. Deeds*, 191 F.3d 540, 548 (4th Cir. 1999) (applying a more deferential standard where outgoing mail was inspected, but not censored).[4]

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[4] In their brief, the defendants urge that we apply the standard set forth in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), "in light of the Supreme Court's indication in *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001), that there is a unitary standard applicable to prisoners' constitutional claims." Appellees' Br. at 16. In essence, they maintain that *Shaw* operated as a de facto overruling of *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). We decline this invitation. In *Shaw*, the Court framed the issue accordingly:

> Under our decision in *Turner v. Safley* ... restrictions on prisoners' communications *to other inmates* are constitutional if the restrictions are "reasonably related to legitimate penological interests." In this case, we are asked to decide whether prisoners possess a First Amendment right to provide legal assistance that enhances the protections otherwise available under *Turner* ....

532 U.S. at 225, 121 S.Ct. 1475 (quoting *Turner*, 482 U.S. at 89, 107 S.Ct. 2254; emphasis added). The Court, however, determined that *Turner* provided the appropriate analytical framework and "decline[d] to cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoners' speech." *Id.* at 231, 121 S.Ct. 1475.

Shaw, therefore, did not address the right of prisoners to send mail outside the prison-the regulation of which is governed by the *Martinez* standard. Furthermore, as noted above, after the Court handed down *Shaw*, other courts of appeals have applied the *Martinez* standard, not the *Turner* standard, to evaluate the regulation of prisoners' outgoing mail.

There are two prongs to the *Martinez* test. "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." *Martinez*, 416 U.S. at 413, 94 S. Ct. 1800; *see also Gaines*, 790 F.2d at 1304. Such interests include "security, order, and rehabilitation." *Martinez*, 416 U.S. at 413, 94 S. Ct. 1800. Second, the challenged action "must be no greater than is necessary or essential to the protection" of that interest. *Id.*

The district court identified the governmental interest at stake in this case as the rehabilitation of Mr. Koutnik and other inmates. There is no question that the rehabilitation of inmates is a legitimate interest of penal institutions. "The more difficult task however, is not in identifying an important governmental interest at stake, rather it is in determining whether the enforcement of [the rule] was no greater an infringement upon [Mr. Koutnik's] first amendment liberties than [was] necessary to protect the state's interest." *Rios v. Lane*, 812 F.2d 1032, 1037 (7th Cir. 1987). It is on this element of the *Martinez* test that Mr. Koutnik focuses his challenge to the district court's judgment. Specifically, Mr. Koutnik claims that the defendants have not established that the mail sent to Northern Sun contained gang symbols or that "the drawing [of] a swastika and referencing the Ku Klux Klan in an outgoing letter threatens a prisoner's rehabilitation." Appellant's Br. at 20. We now address each of these contentions.

With respect to whether Mr. Koutnik's mail to Northern Sun contained gang-related symbols, we believe that this is an assessment that prison staff is uniquely suited to make. Knowledge of prison gang symbols-how they are used and

what they mean-is acquired primarily through interaction with, and observation of, prisoners. Additionally, gang symbolism is not static; symbols change and are added as gangs expand their bases and combine with other groups. Consequently, because the prison staff has daily contact with gang members and because the number and kind of gang symbols do not remain constant, we shall defer to the staff's assessment that Mr. Koutnik's correspondence to Northern Sun contained gang symbols. *Cf. Beard v. Banks*, --- U.S. ----, ---, 126 S. Ct. 2572, 2578, 165 L.Ed. 2d 697 (2006) (plurality opinion) (reiterating that "courts owe 'substantial deference to the professional judgment of prison administrators' " (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 156 L.Ed. 2d 162 (2003))); *Martinez*, 416 U.S. at 405, 94 S. Ct. 1800 (observing that problems related to prison administration require "expertise" "peculiarly within the province of the legislative and executive branches of government").

Mr. Koutnik also maintains that his inclusion of a swastika and his veiled reference to the KKK are not related in any way to his rehabilitation. In his brief, he points to the Supreme Court's statement in *Martinez* that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." 416 U.S. at 412, 94 S. Ct. 1800. However, the Court's statement was premised on two internal policy statements of the Federal Bureau of Prisons. The first of these stated: "Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process." *Id.* at 412 n. 13, 94 S. Ct. 1800 (internal quotation marks and citations omitted). The second acknowledged that "[c]orrespondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined and

may form the basis for good adjustment in the institution and the community." *Id.* (internal quotation marks and citations omitted). Taken in that context, we believe that the Supreme Court's statement in *Martinez* actually supports the defendants' position here. Mr. Koutnik's correspondence was not an effort to establish "constructive, wholesome contact" with the outside community that would foster successful reintegration into society, *id.*; it was an effort to appeal to groups that would hinder, rather than foster, respectful human interaction, both inside and outside of prison. Mr. Koutnik's attempts to market symbols affiliated with racially intolerant groups obviously thwarted the State's legitimate goals "to encourage the plaintiff to live crime-free when he is released from custody" and to foster "the ability to resolve conflicts without resorting to violence, and to recognize that successful reintegration into society requires respecting the rights of others." R.15 at 11. Accordingly, the confiscation of his outgoing mail in this case did "further [the] important or substantial governmental interest" in rehabilitation. *Martinez*, 416 U.S. at 413, 94 S. Ct. 1800.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed

Appendix B

United States District Court,W.D. Wisconsin.
Joseph D. KOUTNIK, Plaintiff,
v.
Lebbeus BROWN, Gerald Berge and Matthew J. Frank,
Defendants.
No. 04 C 580 C.

June 22, 2005.

OPINION AND ORDER

In December 2002, Joseph Koutnik, an inmate at the Wisconsin Secure Program Facility, attempted to mail a letter and several drawings to a retail catalog. Defendant Lebbeus Brown denied delivery of the letter and drawings because they contained a swastika and a coded reference to the Ku Klux Klan. Plaintiff subsequently brought this civil rights action under 42 U.S.C. § 1983 that raises the question whether it is constitutional for prison officials to censor an inmate's outgoing mail in which he uses symbols associated with prison gangs or unsanctioned groups to express a political message. Jurisdiction is present. 28 U.S.C. § 1331.

This matter is before the court on cross motions for summary judgment filed by the parties. Because defendants have shown that the censorship of plaintiff's letter and drawings was generally necessary to further the Secure Program Facility's substantial interest in plaintiff's rehabilitation, I will grant defendant's motion and deny plaintiff's motion. Because I conclude that no violation of plaintiff's First Amendment rights occurred, I will not address the parties' arguments regarding the personal involvement of defendant Frank.

From the proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. *Parties*

At all times relevant to this case, plaintiff Joseph Koutnik was incarcerated at the Wisconsin Secure Program Facility, a maximum security correctional institution located in Boscobel, Wisconsin. Plaintiff is a member of the Simon City Royals gang, a group that is not a white supremacist group and is not affiliated in any way with the Ku Klux Klan or Nazi groups. At all times relevant to this case, defendant Gerald Berge was warden of the facility. Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Defendant Lebbeus Brown has been employed at the Secure Program Facility since July 2000. Currently, he is a captain at the facility; from April 2002 to December 2003, he was a lieutenant at the facility. Defendant Brown has served as the facility's Disruptive Groups Coordinator since April 2003. In this capacity, defendant Brown is responsible for tracking disruptive groups and their members at the facility and documenting their activities, reviewing incoming and outgoing mail and inmate property for gang-related content, preparing reports regarding gang activity for the facility's security staff and Disruptive Groups Coordinators at other correctional institutions, instructing facility staff in the areas of gang identification and gang management strategies, meeting on a regular basis to exchange information with the facility's gang intelligence unit and with other Disruptive Groups Coordinators and assessing ongoing gang activity at the facility. Defendant Brown has received training

regarding the identification and operation of prison and street gangs. He has the ability to recognize gang-related activities. Prior to the incident giving rise to this case, defendant Brown participated in a gang identification training session with the Milwaukee County Police Department, assisted in a gang identification program at the La Crosse County Juvenile Facility and received training in prison gang identification and gang activity at the Corrections Training Center.

Through his experience at the Secure Program Facility and his training, defendant Brown has become familiar with the facility's security policy and with white supremacy issues in the correctional system.

B. *Gang Activity in Correctional Institutions*

Disruptive groups, otherwise referred to as gangs, are groups of individuals that threaten, coerce or harass others and engage in or encourage group members and others to engage in illegal activities. Gangs operate within Wisconsin's correctional system and pose a threat to the security of correctional institutions because of the threat of gang violence and because gangs undermine prison authority by providing a support system for those who oppose prison administration. Gang affiliation is not in the best interest of an inmate's rehabilitation because gangs are antisocial and are frequently engage in criminal activity. Suppressing gang activity in correctional institutions is essential to maintaining a safe and secure environment for inmates, visitors and staff.

One reason inmates are transferred to the Secure Program Facility is to place them in an environment free from gang influences and other adverse factors that exist at other

institutions so that they can concentrate on behavior modification and other coping strategies. The goal is to rehabilitate inmates and reintegrate them into the general populations at less restrictive institutions. Prison officials monitor and manage gang activity through educating corrections staff, conducting searches of inmate property and living areas, monitoring telephone conversations and screening incoming and outgoing mail. They permit inmates at the facility to correspond with anyone through the mail, although officials monitor inmates' non-legal mail closely. Non-legal mail is subject to the restrictions in Wis. Admin. Code § DOC 309.04(4)(c), which allow officials to deny delivery of mail that, among other things, concerns an activity that would violate state law or the administrative rules of the Department of Corrections.

C. *Plaintiff's Letter to Northern Sun*

In the course of his duties on December 30, 2002, defendant Brown examined a letter written by plaintiff intended for delivery to Northern Sun Merchandising in Minneapolis, Minnesota. According to its website, http://www.northernsun.com, Northern Sun offers for sale "message-oriented tshirts, bumperstickers, buttons, posters, etc. covering a wide variety of issues/topics." In addition, the website includes a page that encourages visitors to submit ideas to be placed on products sold by Northern Sun: We reward you for being creative! If your idea would look good on a t-shirt, button or bumpersticker, send it to us and you could make extra money!

> Royalties for ideas that end up on t-shirts start at $0.50 per shirt sold. Ideas that become bumperstickers are usually reward [sic] with a lump sum of $25 (buttons) or $50

(bumperstickers). Occasionaly [sic], we will pay a royalty for each button or bumpersticker sold.

Plaintiff's mail to Northern Sun consisted of two sheets of paper. On one sheet of paper, plaintiff wrote a letter dated December 30, 2002, which reads as follows:

TO WHOM IT MAY CONCERN:
I received your Fall/Winter 02-03 catalog. I enjoyed looking at what y'all are making available to the masses. Being a prisoner of the state currently held captive in a Supermax penitentiary much of what is in your catalog I cannot possess. If you were to make 8 x 10 (or smaller) pictures of some of those posters, stickers etc. me and others similarly situated would at least be able to purchase items from you. Stickers are "Security threats" so they would not be allowed but the sayings would. I noticed that prison reform is not as well represented as is needed and am therefore including some of my ideas you should consider using. let me know what you think. Also if you could send me a list of revolutionary books (softcover) I would appreciate it. And I saw a poster with X; Marley & Gandhi where's the Mao, Lenin & Marx ones? It's will [sic] known the prisoner "class" is one of the most, if not the most, revolutionary and politically conscious "class" in America. It would therefore be beneficial for y'all to support us and become an outlet and provide allowable merchandise for us so we can support you! With that I will end this letter. A response would be greatly appreciated.
In Struggle,
Joseph D. Koutnik

WSPF (# 322794-A)
POB 9900
Boscobel, WI 53805

The other sheet of paper featured a drawing of a swastika. The phrase "The Department of Corruptions" was written above the swastika and the phrase "Keeping Kids in Kages" was written below it. The letter and drawings expressed plaintiff's political views and criticized the Department of Corrections and prison officials.

Defendant Brown denied delivery of plaintiff's letter and issued a "Notice of Non-Delivery of Mail" to plaintiff. On the form, defendant Brown indicated that the "drawing or swasitka [sic] violates DOC 30320[sic] Warning issued." The warning issued to plaintiff consisted of the warning on the form and a verbal warning given to plaintiff by defendant Brown. In addition, defendant Brown checked a box on the Notice of Non-Delivery of Mail form indicating that the reason for non-delivery was that the "Item concerns an activity, which, if completed, would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections."

The notation "DOC 30320" refers to Wis. Admin. Code § DOC 303.20, which provides in part that

> Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11), or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolisms is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an

unsanctioned group activity.

Although § DOC 303.02(11) defines "Inmate gang" as a group of inmates that is not sanctioned under Wis. Admin. Code § DOC 309.22, the rule's reference is a mistake. The proper reference concerning unsanctioned groups would be to § DOC 309.365. Under that section, the Ku Klux Klan, Nazi groups and other white supremacist groups are not sanctioned at the Secure Program Facility.

Through his training and experience, defendant Brown has learned that the swastika is a symbol associated with Nazism and Adolf Hitler as well as oppression and genocide of racial, ethnic and religious minorities. The swastika has become a symbol of Aryan pride and white supremacy as well as racial hatred, although it has religious meanings to other groups such as Buddhists and Native Americans. Defendant Brown understands the term "gang symbols" to mean actions, objects or other things that represent gang or disruptive group identification, activity or beliefs, including hand signs, colors, stars, wine glasses, canes, swastikas, forks, tattoos, letters, numbers, etc. Defendant Brown understands the term "gang symbolism" to mean the practice of representing gang or disruptive group identification, activity or beliefs by means of symbols or of attributing symbolic meanings or significance to activities, objects or other things, including tattoos, clothing styles, stance, hand signs, drawings, writing style, etc.

Defendant Brown denied delivery of plaintiff's letter because the swastika is a symbol of white supremacy and because the phrase "Keeping Kids in Kages" was written below the swastika. The capitalization of the letter "k" in this phrase, along with the distinctive spelling of the word "Kages," led him to conclude that the phrase was intended

to stand for the Ku Klux Klan, a white supremacist group. (In his training and experience with prison gang written materials, defendant Brown has learned that inmates attempt to convey gang-related messages by using the first letters of a sequence of words and that inmates who adhere to a white supremacist ideology identify with the Ku Klux Klan and Nazism.)

Defendant Brown concluded that plaintiff was identifying with white supremacist groups by drawing the swastika and writing "Keeping Kids in Kages." In addition, defendant Brown concluded that allowing plaintiff to engage in the business of merchandising this material while incarcerated would imply that the Department of Corrections and the Secure Program Facility were associated with and condoned white supremacy activity within the institution, as well as the promotion and growth of such activity inside and outside the institution. He believed that a security concern would arise if inmates held this perception because it could cause unrest and racial tension among minority inmates who felt threatened and it could encourage white supremacist activity among certain inmates. (Race hatred and the violence associated with it are particular security concerns within the correctional system.)

Defendant Brown concluded also that allowing plaintiff to merchandise white supremacist sentiments from the prison was incompatible with the Secure Program Facility's duty to rehabilitate plaintiff. A goal of rehabilitation efforts at the facility is to encourage an inmate to live crime-free when he is released from custody. Other rehabilitation goals include development of an inmate's ability to resolve conflicts without resorting to violence and the recognition that successful reintegration into society requires respecting the rights of others. Permitting plaintiff to merchandise white

supremacist material from prison is incompatible with these rehabilitation goals.

Defendant Brown checked a box on the Notice of Non-Delivery form indicating that plaintiff's mail was to be destroyed in light of the security and rehabilitation concerns. Plaintiff filed an inmate complaint on February 19, 2003, after several informal appeals to defendant Berge prompted no response. The inmate complaint examiner recommended dismissal of plaintiff's complaint on March 24, 2003 and the deputy warden accepted this recommendation on April 1, 2003. On April 2, 2003, plaintiff appealed the disposition of his complaint to the corrections complaint examiner, who recommended dismissal of plaintiff's complaint on April 21, 2003. On April 27, 2003, plaintiff received a document entitled "OOS Report" indicating that the Secretary of the Department of Corrections accepted the recommendation of the corrections complaint examiner and that plaintiff's complaint was dismissed.

D. *Library Materials at the Secure Program Facility*

At least two books available to inmates at the Secure Program Facility have a swastika on the cover. One of these books is entitled *The Rise and Fall of Adolf Hitler*. It has a visible depiction of a swastika on its back cover. The book provides a history of Nazi Germany and does not promote Nazism or white supremacy. The other book in the library with a swastika on its cover is *American Reich*, which was written by Douglas Muir. It is a fictional work concerning a planned coup to end democracy in the United States that is engineered by high government officials and a coalition of militias, the Ku Klux Klan and American Nazis. The book does not promote Nazism, Nazi ideals or the white supremacist ideals of the Ku Klux Klan.

In addition, the facility's library contains a book written by Paul Gillette entitled *Inside the Ku Klux Klan.* Its cover depicts Klan members in robes standing around a burning cross. The book chronicles the history and activities of the Klan and exposes crimes and atrocities committed by the group, but it does not promote white supremacy. The library does not contain materials that promote racial hatred, white supremacy or Nazi ideals.

OPINION

At the outset, I note that defendant Brown's conclusion that the contents of plaintiff's drawings violated Wis. Admin. Code § 303.20(3) is entitled to deference in light of his position as the Disruptive Groups Coordinator at the Secure Program Facility and his training and experience in the field of gang identification. It is undisputed that the Ku Klux Klan, Nazi groups and other white supremacist groups are not sanctioned groups at the Secure Program Facility. Also entitled to deference is defendant Brown's conclusion that plaintiff was identifying with white supremacist groups by drawing the swastika and the "Keeping Kids in Kages" caption, which plaintiff agrees was intended as a coded reference to the Ku Klux Klan. Defendant Brown's conclusions regarding plaintiff's drawings were grounded on his knowledge and expertise in the area of prison gangs and would be entitled to deference even if I disagreed with them. *Frasie v. Terhune,* 283 F.3d 506, 515 (3d Cir. 2002) (judiciary should defer to prison officials' judgments "in establishing, interpreting and applying prison regulations.").

Before addressing the merits of this case, I must decide the proper standard of review for analyzing plaintiff's First Amendment claim.

A. *Standard of Review*

In screening plaintiff's complaint, I noted that the "decision to censor an inmate's outgoing mail presents a different question from a decision to censor mail intended for another inmate," Order, dkt. # 3, at 8, and stated that the proper standard for analyzing plaintiff's First Amendment claim was set out in *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L.Ed. 2d 224 (1974). Under *Martinez*, 416 U.S. at 413, the question is whether the censorship furthers "one or more of the substantial governmental interests of security, order, and rehabilitation" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved." Defendants argue that plaintiff's claim should be analyzed according to the more familiar standard applicable to prison inmate constitutional claims announced in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L.Ed. 2d 64 (1987). Under that standard, an infringement of an inmate's constitutional rights is permissible so long as the act in question is "reasonably related to legitimate penological interests." *Id.* at 89. (Although defendants do not make the point, I note that had plaintiff's letter and drawing been discovered and confiscated at any time before he placed them in the mail, it would be clear that the *Turner* reasonableness applied).

Defendants contend first that the *Turner* standard governs this case because plaintiff's letter was part political speech and part commercial transaction. According to defendants, the "most reasonable way of viewing the plaintiff's mail is that he not only wished to turn a few bucks by selling his design, but also to send a message through proposed use of his design by Northern Sun." Dfts.'s Br., dkt. # 12, at 14. Although defendants do not make the point explicitly, they

appear to argue that the more exacting scrutiny required by *Martinez* is not appropriate because commercial speech is entitled to less protection than purely political speech under the First Amendment. Defendants' analogy to commercial speech does not help their argument. The test for evaluating limitations on commercial speech under the First Amendment is strikingly similar to the standard announced in *Martinez*. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed. 2d 341 (1980), the Supreme Court established a test for analyzing restrictions on commercial speech. Under that test, restrictions on constitutionally protected commercial speech are valid if the government can "assert a substantial interest to be achieved" by the restriction and if the restriction is "designed carefully to achieve the State's goal." *Id.* at 564. These requirements for restrictions on commercial speech mirror the standards for analyzing restrictions on outgoing mail set forth in *Procunier*.

As additional support for their argument that the *Turner* standard applies in this case, defendants cite the Supreme Court's decision in *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475, 149 L.Ed. 2d 420 (2001). In *Shaw*, the Court considered the scope of an inmate's First Amendment right to provide legal assistance to another inmate. In discussing the deference owed to prison administrators in day-to-day decisionmaking, the Court referred to the *Turner* standard as a "unitary, deferential standard for reviewing prisoners' constitutional claims." *Id.* at 229. Defendants contend that this language mandates application of the *Turner* standard in this case. I disagree, for three reasons. First, *Shaw* did not involve a restriction on outgoing mail; it involved a restriction on inmate-to-inmate correspondence. Second, the Court mentioned *Martinez* in its opinion but did not expressly overrule it. Third, defendants have not cited a

single case to support their argument. Indeed, no federal court has come to the conclusion advocated by defendants, presumably because of the well-settled principle that lower federal courts may not overrule or otherwise ignore Supreme Court precedent that the Court itself has not overruled. *Scheiber v. Dolby Laboratories, Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002). Although one could argue that a separate standard for one narrow category of actions is unwise or unnecessary, the Court has not overruled *Martinez* with respect to outgoing mail and lower courts continue to apply it in this context. *Nasir v. Morgan*, 350 F.3d 366, 371 (3d Cir. 2003) (questioning continuing viability of *Martinez* in any context but applying it to regulation restricting outgoing mail). Therefore, I will analyze plaintiff's claim under the standard for outgoing mail set out in *Martinez*.

B. *Analysis Under Martinez*

Plaintiff admits that his purpose in drawing the swastika and writing "Keeping Kids in Kages" was to criticize the Department of Corrections and advocate prison reform. He notes correctly that prison officials may not censor inmate correspondence merely because it is critical of them or because it expresses unpopular or even inflammatory opinions. *Martinez*, 416 U.S. at 415-16; *Loggins v. Delo*, 999 F.2d 364, 366 (8th Cir. 1993). However, this case is not as simple as plaintiff contends. Defendant Brown censored plaintiff's mail not because the sentiments plaintiff expressed were critical of the department but because plaintiff incorporated symbols associated with unsanctioned groups or gangs in his criticism. Thus, the question presented is whether the limited First Amendment protections afforded to prison inmates allow them to incorporate gang-related symbols and phrases into outgoing correspondence intended only to criticize their captors.

With respect to the first prong of the *Martinez* test, defendants have identified institution security and inmate rehabilitation as the interests furthered by the censorship of plaintiff's letter and drawing. Both of these interests were identified as substantial interests by the Court in *Martinez, see also Pell v. Procunier,* 417 U.S. 817, 823 (1974) ("[a] paramount objective of the corrections system is the rehabilitation of those committed to its custody [and] ... central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves"), and prison officials are afforded substantial deference in making decisions about what actions and objects present a threat to prison security and inmate rehabilitation. *Pell,* 417 U.S. at 827. The threat to prison security posed by organized gang activity is well documented. *E.g., Rios v. Lane,* 812 F.2d 1032, 1037 (7th Cir. 1987) ("it is difficult to conceive of a single factor more detrimental to penological objectives than organized gang activity"). Suppressing gang activity is essential to maintaining secure conditions within prison walls because prison gangs pose a threat of physical violence and provide support for those who oppose prison officials. Curbing gang-related activity is also an essential part of the Secure Program Facility's effort to rehabilitate its inmates. It is undisputed that prison gangs and other unsanctioned groups impede efforts to rehabilitate inmates because they promote criminal activity and other antisocial behavior. Creation of a gang-free environment is one of the purposes of the Secure Program Facility, allowing inmates to focus on changing their behavior to avoid criminal activity, resolve conflicts without resort to violence and respect the rights of others after they are released.

In *Martinez,* 416 U.S. at 415, the Court invalidated prison

regulations that allowed the censorship of complaints, grievances, and inflammatory political and racial views. The regulations did not survive scrutiny because the prison officials failed to show that they were "in any way" necessary to further the prison's interest in security, order or rehabilitation. Because the regulations were not tethered to any governmental interest, they invited mail screeners to "apply their own personal prejudices and opinions as standards for prisoner mail censorship." *Id.* By contrast, the present case involves a piece of mail that was censored pursuant to a regulation that is grounded firmly in the interests of security and rehabilitation.

As in *Rios*, 812 F.2d at 1037, the difficult question in this case is not whether the censorship of plaintiff's letter and drawings was connected to substantial governmental interests but whether defendants' enforcement of Wis. Admin. Code § DOC 303.20 "was no greater an infringement on [plaintiff's] first amendment liberties than necessary to protect the state's interest[s]." Although the *Martinez* standard requires greater scrutiny of the actions of prison officials, it does not negate completely the deference accorded to prison officials in enforcing rules designed to preserve order and security. Indeed, the Court began its discussion in *Martinez* by highlighting the "hands-off attitude toward problems of prison administration" that federal courts must adopt when analyzing constitutional claims of prison inmates. *Id.* at 404. With respect to the specific task of reviewing inmate correspondence, the Court recognized that prison officials need not "show with certainty that adverse consequences would flow from the failure to censor a particular letter." *Id.* It recognized that a certain amount of discretion is necessary to the discharge of any prison official's duty and required only that a challenged decision be "generally necessary" to protect the

governmental interest at issue. *Id.*

Although deference is owed to defendant Brown's judgment that plaintiff's letter was an attempt to encourage the growth of white supremacy groups, the "implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 104 L.Ed. 2d 459 (1989); *see also Martinez*, 416 U.S. at 416 (prison security not threatened by outgoing letters that contain "inflammatory political, racial, religious or other views or beliefs"). Outgoing correspondence is likely to present a security risk when it contains information pertaining to escape plans or ongoing criminal activity. *Thornburgh*, 490 U.S. at 412; *McNamara v. Moody*, 606 F.2d 621, 624 (5th Cir. 1979). Defendants do not argue that plaintiff's letter contained information that falls into either of these categories. It is difficult to see how the security of the Secure Program Facility would be threatened by allowing plaintiff to send a letter containing a swastika and a reference to the Ku Klux Klan to a retail catalog. Accepting as true defendant Brown's conclusion that plaintiff's intent in using the symbols was to identify with and promote white supremacist groups, the connection between that promotion and the security of the Secure Program Facility is not readily apparent.

Defendants argue that plaintiff's letter threatened the facility's security because plaintiff wrote the letter in the hope that his drawing would be "reproduced by Northern Sun in a form which would be re-introduced into the prison systems and would circulate among inmates." Dfts.'s Br., dkt. # 12, at 21. Censorship of plaintiff's letter was justified, they contend, because prison officials have the authority to take preemptive action to prevent security issues from

arising so long as their actions are predicated on legitimate security concerns. *Hadi v. Horn*, 830 F.2d 779, 785 (7th Cir. 1987); *cf. Gaines v. Lane*, 790 F.2d 1299, 1305 n. 4 (7th Cir. 1986) (because prison may "exclude all packages in the interest of security, the prison must also have the ability to solve the problem before it starts by preventing the solicitation of packages"). Defendants contend further that censoring plaintiff's mail was necessary to preserve security because allowing plaintiff to send his mail would imply that the facility and the Department of Corrections "were associated with and condoned" the promotion and growth of white supremacist activity inside and outside the facility.

Assuming defendants are correct that plaintiff was trying to have his white supremacist views put into a form that would be available to other inmates, they have not explained how inmates would have access to the Northern Sun catalog or to merchandise featuring plaintiff's drawings. If Northern Sun decided to sell merchandise featuring plaintiff's drawings through its catalog, officials at the facility would be fully justified in refusing to deliver copies of the catalog or merchandise that featured plaintiff's drawings, either because they contained gang-related symbols or because plaintiff's message would encourage disrespect for prison staff. But defendants' argument appears to be premised on their inability to do just this. In other words, defendant Brown had to deny delivery of plaintiff's letter and drawings when they were outgoing because he could not lawfully deny delivery of incoming Northern Sun catalogs or merchandise that featured the swastika or the "Keeping Kids in Kages" phrase. This position does not make sense because prison officials have greater authority to censor incoming mail that implicates security concerns in comparison to their authority to censor outgoing mail. *Thornburgh*, 490 U.S. at 413; *Turner*, 482 U.S. at 91-92

(correspondence between inmates at different institutions); *cf. Young v. Lane*, 922 F.2d 370, 376-77 (7th Cir. 1991) (upholding restrictions on wearing headgear in prison because of dangers related to gang affiliation).

Defendants argue that inmates at the facility could develop a perception that the facility condoned plaintiff's white supremacist views and that this perception could cause unrest and racial tension among minority inmates and could encourage white supremacist activity among inmates who ascribe to plaintiff's views. Again, however, defendants have not explained how other inmates at the facility would know that the facility had allowed plaintiff's letter and drawings to be delivered to Northern Sun. I know from other prison lawsuits brought before this court that many inmates at the Secure Program Facility have little to no contact with other prisoners. *E.g., Jones 'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001). Although *Martinez* does not call for a "strict scrutiny" test, *Thornburgh*, 490 U.S. at 411, it requires more than conclusory assertions. Defendants have not adduced specific facts showing that censorship of plaintiff's letter and drawings were generally necessary to protect the facility's interest in security.

Although defendants' arguments with respect to security are not persuasive, they have asserted another ground to support the censorship of plaintiff's mail. Defendant Brown denied delivery of plaintiff's mail because he concluded that allowing plaintiff to merchandise political messages that contained symbols associated with white supremacist groups interfered with the facility's interest in rehabilitating plaintiff. It is undisputed that gang affiliation within prisons disrupts rehabilitation efforts because gangs often encourage criminal activity and resistance to prison authority. Therefore, prison officials have an interest in suppressing

any and all gang-related activity within prison walls. In this case, defendant Brown concluded that it would be incompatible with the facility's attempts to rehabilitate plaintiff to allow plaintiff to merchandise his drawings, which incorporated symbols associated with racial hatred and white supremacist groups. This conclusion is entitled to deference from this court. Preventing an inmate from using gang-related symbols to express his opinions is generally necessary to effectuate the inmate's rehabilitation. Confiscation and destruction of the letter and drawing were not exaggerated responses; prison officials do not transgress the boundaries of the First Amendment by confiscating written material that contains gang-related symbols. (Had plaintiff's letter been discovered during a search of his cell, officials at the facility would have been fully justified in confiscating it.) Even if I accepted plaintiff's argument that his intent was solely to criticize the Department of Corrections, defendant Brown would still have been justified in refusing to mail plaintiff's letter and drawings because of the presence of the swastika and the coded reference to the Ku Klux Klan.

Plaintiff remains free to express disagreement with his custodians or criticize them. Defendants may not censor his mail merely because he does so. There is no indication that defendant Brown has censored all communication between plaintiff and Northern Sun or anyone else. However, plaintiff should be aware that prison officials remain free to censor any of his mail that contain the symbols of gangs or other unsanctioned groups.

Plaintiff's arguments regarding the unconstitutionality of defendant Brown's actions are unpersuasive. First, he renews his attack on Wis. Admin. Code § DOC 303.20, arguing that the regulation is unconstitutionally overbroad

and that defendants are using the regulation to suppress speech that is gang-related but that does not explicitly promote violence or criminal activity. In an earlier order in this case, I rejected plaintiff's argument that § DOC 303.20 is facially unconstitutional in light of the compelling interest prison officials have in suppressing any and all gang-related materials and activity. Order, dkt. # 3, at 10. Plaintiff has presented nothing beyond his own opinion to show that this conclusion was erroneous. The fact that an inmate does not a gang-related symbol with the intent of promoting violent activity is not relevant to the analysis. Again, assuming that plaintiff had *no intent whatsoever* to promote gang activity in his letter, Wis. Admin. Code § DOC 303.20 would still be valid because "a regulation which generally advances a legitimate governmental interest of sufficient importance is not invalid simply because the government does not demonstrate that each and every application of that regulation necessarily furthers that interest." *Gaines v. Lane*, 790 F.2d at 1304.

Plaintiff notes that his incarceration has rendered him an "inactive" member of the Simon City Royals, a gang that he contends is not associated with any white supremacist groups and that does not use the swastika as one of its identifying symbols. Plaintiff's active or inactive status in the Simon City Royals is irrelevant to the analysis of defendant Brown's decision to censor his mail, as is the fact that the Simon City Royals does not use the swastika as a symbol. Prison officials have an interest in suppressing *all* gang-related activity and expression, not merely symbols that associate an inmate with one specific gang.

Finally, plaintiff argues that two books available to inmates at the Secure Program Facility feature swastikas on their covers, *The Rise and Fall of Adolf Hitler* by William Schirer

and *American Reich* by Douglas Muir. Additionally, plaintiff notes that the facility's library contains a book written by Paul Gillette entitled *Inside the Ku Klux Klan*, which depicts Klan members standing around a burning cross on its cover. *The Rise and Fall of Adolf Hitler* is a historical account of Nazi Germany; *American Reich* is a fictional work about American Nazis and the Ku Klux Klan participating in a plot to overthrow the United States government; and *Inside the Ku Klux Klan* is a historical account of the criminal activities and atrocities committed by Klan members. The fact that these books contain the same symbols as plaintiff's mail is insufficient to show that defendant Brown's decision to censor plaintiff's letter violated his First Amendment rights. As noted earlier, defendant Brown's conclusion that plaintiff was attempting to promote white supremacy in his mail is entitled to deference. It is undisputed that none of the books identified by plaintiff promote white supremacy; two are historical accounts and the other is a fictional work.

In conclusion, plaintiff "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system." *Pell*, 417 U.S. at 822. It is well established that rehabilitation is a legitimate penological objective of the penal system. *Id.* at 823. Allowing an inmate to express opinions using symbols associated with gangs and racial hatred is incompatible with a prison's interests in eliminating all traces of gang influence and rehabilitating its inmates. Therefore, defendants did not violate plaintiff's rights under the First Amendment by denying delivery of his letter and drawings.

ORDER

IT IS ORDERED that the motion for summary judgment

filed by defendants Lebbeus Brown, Gerald Berge and Matthew Frank is GRANTED and the motion for summary judgment filed by plaintiff Joseph Koutnik is DENIED. The clerk of court is directed to enter judgment for defendants and close this case.

Appendix C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 30, 2006

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-3193

JOSEPH D. KOUTNIK

Plaintiff-Appellant,

v.

LEBBEUS BROWN, GERALD A. BERGE, Warden, and MATTHEW J. FRANK, Secretary,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin

No. 04 C 580

Barbara B. Crabb, *Chief Judge*

ORDER

Upon consideration of appellant's petition for rehearing en banc, filed on September 22, 2006, and the answer of

appellees, filed on November 3, 2006, all of the judges on the original panel have voted to deny the petition, and a majority of the judges in active service voted to deny rehearing en banc.* Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

* Judge Flaum took no part in the consideration or decision of the petition for rehearing on banc. Judges Rovner, Wood and Williams voted to grant the petition for rehearing en banc.

Appendix D

WISCONSIN ADMINISTRATIVE CODE
DEPARTMENT OF CORRECTIONS
CHAPTER DOC 303. DISCIPLINE
SUBCHAPTER III. OFFENSES AGAINST INSTITUTIONAL SECURITY

Current through Reg. No. 612 (December 2006)

DOC 303.20 Group resistance and petitions.

(1) Any inmate who participates in any group activity which is not approved under s. DOC 309.365 or is contrary to provisions of this chapter is guilty of an offense.

(2) Any inmate who joins in or solicits another to join in any group petition or statement is guilty of an offense, except that the following activities are not prohibited:

(a) Group complaints in the inmate complaint review system.

(b) Group petitions to courts.

(c) Authorized activity by groups approved by the warden under s. DOC 309.365 or legitimate activities required to submit a request under s. DOC 309.365 (3) or (4).

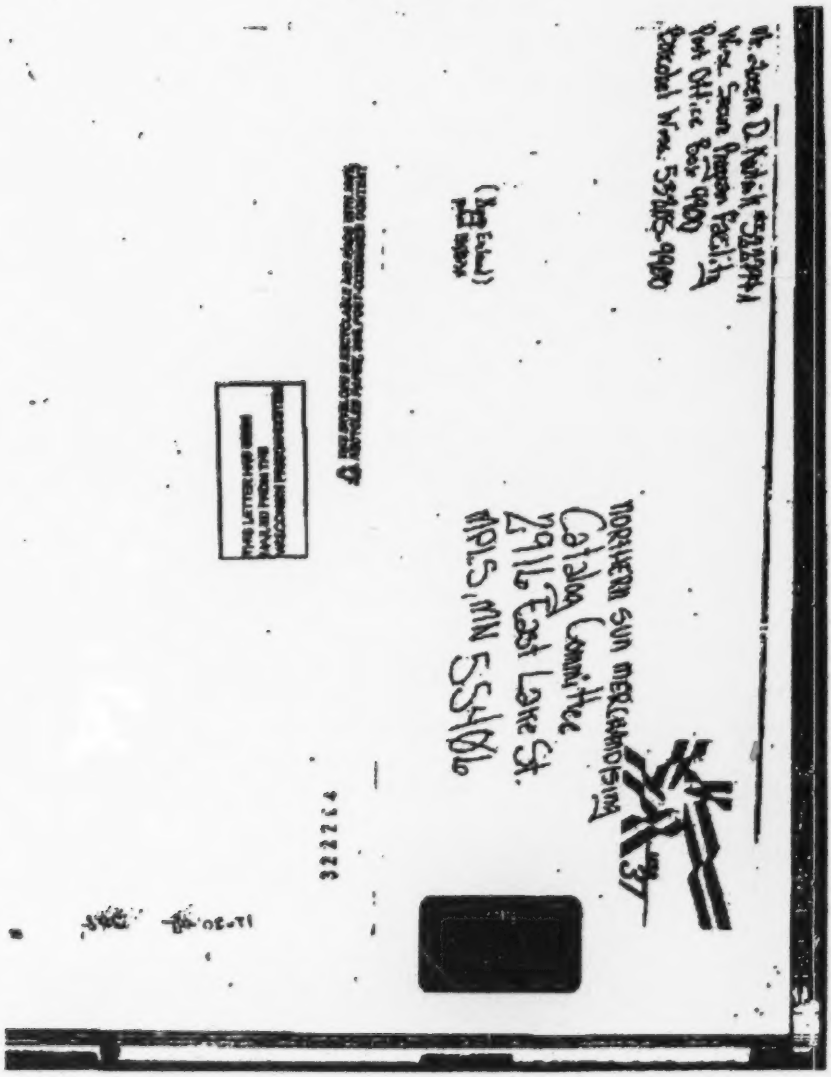
(d) Group petitions to government bodies, legislators, courts or newspapers.

(3) Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02 (11), or possesses any gang literature, creed, symbols or symbolisms is guilty

of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

History: Cr. Register, December, 2000, No. 540, eff. 1-1-01; corrections in (1) and (2) (c) made under s. 13.93 (2m) (b) 7., Stats., Register, March, 2001, No. 543.

Appendix E



BEST AVAILABLE COPY

To Whom It May Concern;

I received your Fall/Winter (20[illegible]-20[illegible]) catalog & enjoyed looking at what y'all are making available to the inmates being a prisoner at [illegible] currently held captive in a Supermax penitentiary such as that in your catalog I cannot possess. If you were to have 8"x10" (or smaller) pictures of some of those posters stickers &c. the 2nd photo similar stated would at least be able to purchase items from you. Stickers are "security threats" so they would not be allowed but the posters would. I noticed that prison reform is not well represented & is needed and is therefore including some of my ideas you should consider using. Let me know what you think. Also if you could send me a list of "radical" posters (software) I would appreciate it. And I even spoke with X, Charles Manson about the discipline clerk said. It's still known "the prisoner class" is one of the most hit on the rock, revolutionary, and politically conscious class in America. It would therefore be beneficial for y'all to support & send letters on behalf and provide absolute anonymity for us so we can support your efforts that I will end the letter. No response would be greatly appreciated.

In Struggle,
Joseph D. Kostrik
WSPF #322794 (A1)
PCB 9900
Boscobel, Wisc 53805

Writing Materials

[redacted]

DEPARTMENT OF CORRUPTIONS

AMERICAN GULAGS

2,000,000

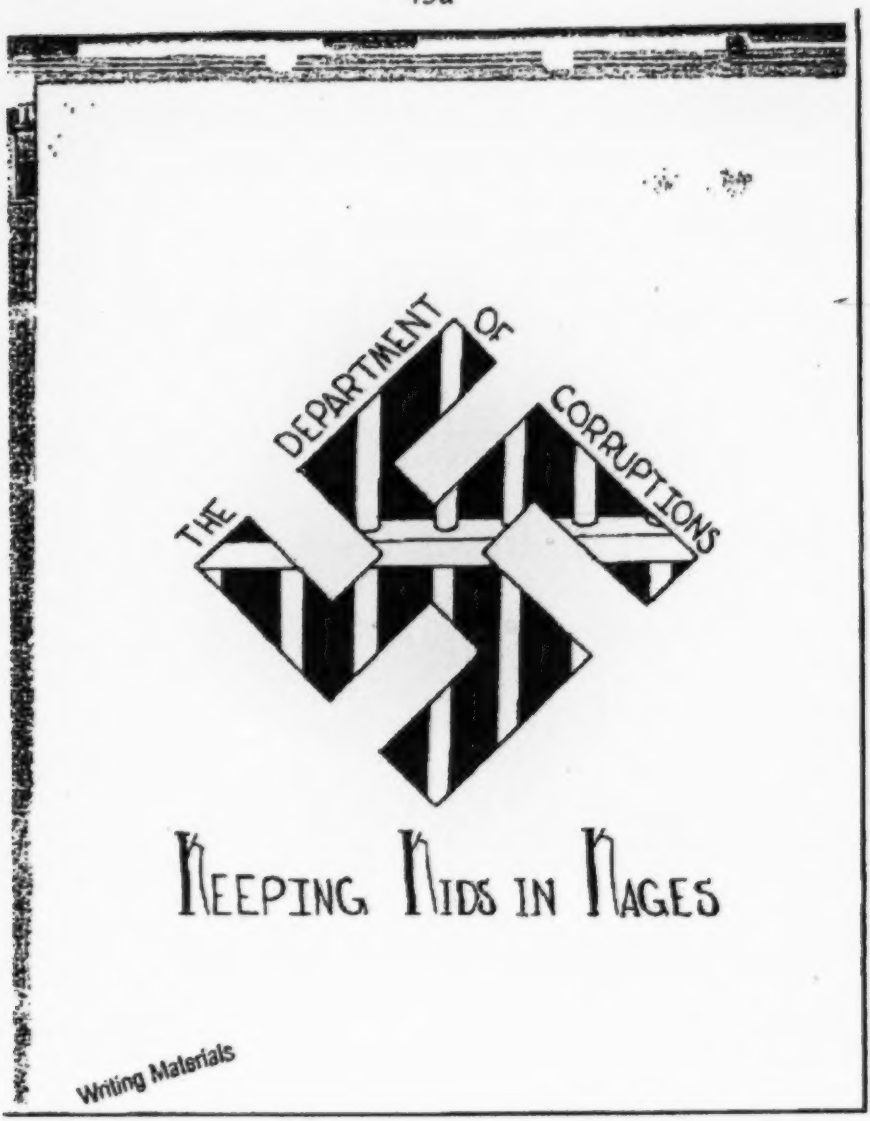
Men, Women & Kids Incarcerated

"People Cause Problems. Get Rid Of People; No Problems." - Dear Stalin

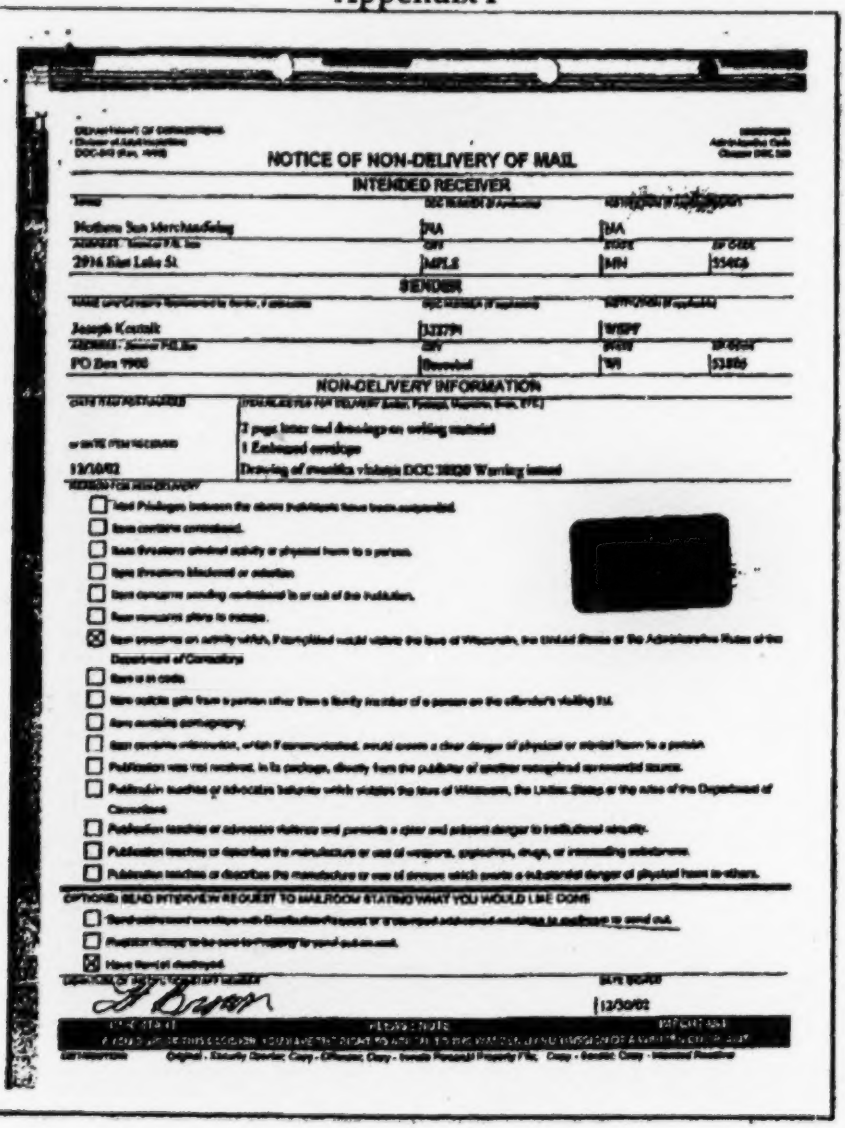
G.O.P

IS ENGLISH FOR

AL QAEDA


THE DEPARTMENT OF CORRUPTIONS
KEEPING KIDS IN KAGES
Writing Materials

Appendix F



NOTICE OF NON-DELIVERY OF MAIL

INTENDED RECEIVER

Mothers Sun Merchandising	[illegible]	[illegible]	
2916 East Lake St	[illegible]	MN	55406

SENDER

Joseph Kozmik	332791	WISP	
PO Box 9900	Stoughton	WI	53589

NON-DELIVERY INFORMATION

	2 page letter and drawings on writing material
	1 Embossed envelope
12/10/02	Drawing of swastika violates DOC 309.05 Warning issued

REASON FOR NON-DELIVERY

- ☐ Mail Privileges between the above individuals have been suspended.
- ☐ Item contains contraband.
- ☐ Item threatens criminal activity or physical harm to a person.
- ☐ Item threatens blackmail or extortion.
- ☐ Item contains pending contraband in or out of the institution.
- ☐ Item contains plans to escape.
- ☒ Item concerns an activity which, if completed would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections
- ☐ Item is in code.
- ☐ Item solicits gifts from a person other than a family member of a person on the offender's visiting list.
- ☐ Item contains pornography.
- ☐ Item contains information, which if communicated, would create a clear danger of physical or mental harm to a person.
- ☐ Publication was not received, in its package, directly from the publisher of another recognized or approved source.
- ☐ Publication teaches or advocates behavior which violates the laws of Wisconsin, the United States or the rules of the Department of Corrections.
- ☐ Publication teaches or discusses violence and presents a clear and present danger to institutional security.
- ☐ Publication teaches or describes the manufacture or use of weapons, explosives, drugs, or unreasonable substances.
- ☐ Publication teaches or describes the manufacture or use of devices which create a substantial danger of physical harm to others.

OPTIONAL: SEND INTERVIEW REQUEST TO MAILROOM STATING WHAT YOU WOULD LIKE DONE

- ☐ Send entire item/envelope with Distribution Request or Unopened Legal Mail envelope to mailroom to send out.
- ☐ Photocopy to be sent to requesting or send out item/envelope.
- ☒ Have item(s) destroyed.

[illegible] 12/30/02

Original - Security Director; Copy - Offender; Copy - Inmate Personal Property File; Copy - Sender; Copy - Intended Receiver

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

19

JOSEPH D. KOUTNIK,
PLAINTIFF,

v

LEDDENS BROWN,
GERALD BEREL AND
MATTHEW J. FRANK,
DEFENDANTS

CASE No. 04-C-588-C

FIRST AFFIDAVIT OF JOSEPH D. KOUTNIK IN SUPPORT OF SUMMARY JUDGMENT MOTION

I, JOSEPH D. KOUTNIK, DECLARE UNDER PENALTY OF PERJURY THAT BASED ON MY OWN PERSONAL KNOWLEDGE THE FOLLOWING IS TRUTHFUL AND CORRECT.

1.) I AM THE PLAINTIFF IN THE ABOVE CAPTIONED CASE, AM 53 YEARS OF AGE AND AM COMPETENT TO TESTIFY TO THE MATTERS STATED HEREIN

2.) ON [illegible] I ATTEMPTED TO MAIL A LETTER ALONG WITH SOME INK DRAWINGS TO NORTHERN SUN MERCHANDISING LOCATED AT 2916 LAKE ST. MINNEAPOLIS, MINNESOTA 55416.

3.) THE MAIL IN QUESTION CONSISTED OF TWO SHEETS OF PAPER IN AN ENVELOPE. ATTACHED A DRAWING WITH A CHARACTER THAT D.O.C. (DEFENDANTS RESPONSE TO PRODUCE EXHIBITS A, B, C ARE TRUE AND CORRECT COPIES OF THE LETTER, ENVELOPE AND DRAWING OF WHICH WERE MAILED DELIVERED ATTACHED CHARACTER DRAWING WHICH APPEARS ON CCE REQUEST FORM.)

4.) NORTHERN SUN MERCHANDISING IS A COMPANY THAT DISTRIBUTES

PRIOR TO HIS INCARCERATION, THAT MAJOR LATIN DISCIPLES (MLD) ARE A HISPANIC ORGANIZATION. THAT IS THEIR MEMBERSHIP IS ALMOST HISPANIC

[4] I HAVE IN MY POSSESSION, A DICTIONARY CALLED "THE AMERICAN HERITAGE DICTIONARY" (1985, 2001) AND IT DEFINES SWASTIKA AS: "(1) THE EMBLEM OF NAZI GERMANY. (2). AN ANCIENT COSMIC OR RELIGIOUS SYMBOL FORMED BY A GREEK CROSS WITH THE ARMS BENT AT RIGHT ANGLES. (FROM THE SANSKRIT SVASTIKAH, SIGN OF GOOD LUCK)"

[5] THROUGH MY STUDIES OF EUROPEAN HISTORY I KNOW THAT SWASTIKA HAS MANY MEANINGS. BUT IN THE CONTEXT I USED IT WAS A SYMBOL TO COMPARE THE D.O.C. TO THE SYSTEM OF WAREHOUSING JEWS, SLAVS, AND OTHER "UNDESIRABLES" IN CONCENTRATION CAMPS DURING THE THIRD REICH IN NAZI OCCUPIED "GERMANY", AND TO COMPARE THE RACIST POLICY OF INCARCERATING JUVENILES IN PRISON CELLS TO THE K.K.K. AND ALSO TO COMPARE PRISON OFFICIALS TO KU KLUX KLANSMEN

[6] I AM OF SLAVIC BLOOD AND IT IS MY UNDERSTANDING THAT THE NAZIS KILLED MORE SLAVS THAN ANY OTHER PEOPLES. TO SAY I WAS PROPAGATING OR IDENTIFYING WITH A GROUP THAT CONSIDERED BY FOLK "SUB-HUMAN" IS INSULTING. AT BEST ALL I WAS "PROMOTING" OUR PRISON REFORM IN MY LETTER CLEARLY STATED.

[7] I HAVE CHECKED OUT BOOKS FROM WSPF'S PRISON LIBRARY THAT HAVE SWASTIKAS ON THEIR COVERS. ONE OF WHICH WAS "THE RISE AND FALL OF ADOLF HITLER." BY: WILLIAM SHIRER. ALSO ANOTHER BOOK WITH BOXED KU KLUX KLANSMEN ON THE COVER CIRCLED AROUND A SWASTIKA CROSS ON THE

-5-

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DOCKET # 26

U.S. DISTRICT COURT
WEST DIST OF WISCONSIN

MAR 2 8 2005

FILED
PATRICIA M. OWENS, CLERK

JOSEPH D. KOUTNIK,

Plaintiff

v.

Case No. 04-C-

LEBBEUS BROWN,
GERALD BERGE, and
MATTHEW J. FRANK,

Defendants.

Plaintiff's Response to Defendants' Proposed Findings of Fact

NOW COMES the above named plaintiff, pro se, and submit the following as his Response to Defendants' Proposed Findings of Fact ("DPFOF"), written verbatim as follows:

FINDINGS OF FACT

1) Plaintiff, Joseph D. Koutnik, at the times relevant to this action was incarcerated at the Wisconsin Secure Program Facility (WSPF) (Complaint ¶4; Answer ¶4)

Response No. 1) ADMIT

2) Defendant, Lebbeus Brown is currently a Supervising Officer 2 (Captain) at WSPF (Brown Affidavit of February 15 2005, ¶1, p 1) Prior to this he held the position of Supervising Officer 1 (Lieutenant) from April 2002 to December 2003 (Ibid)

Response No 2) ADMIT

3) Defendant, Gerald Berge at the times relevant to this action was employed as the Warden at WSPF (Complaint ¶5; Answer ¶5)

ANY GANG RELATED CRIMES.
(I KOUTNIK AFFIDAVIT: MARCH 8D, 2005 ¶7 p2)

14) SUPPRESSING GANG ACTIVITY IN DOC INSTITUTIONS, INCLUDING WSPF, IS IMPERATIVE TO MAINTAINING A SAFE AND SECURE ENVIRONMENT FOR STAFF, INMATES AND VISITORS (BROWN AFFIDAVIT OF FEBRUARY 15, 2005 ¶11, p.4)

RESPONSE 14) DENY. THIS IS IRRELEVANT TO ANY ISSUE IN THIS ACTION. THAT SAID, NO PRISONERS AT W.S.P.F. HAVE CONTACT WITH VISITORS FEW, VERY FEW, HAVE CONTACT WITH OTHER PRISONERS AND STAFF EXCEPT WHEN SHACKLED/HANDCUFFED. SOME GROUPS CONSIDERED BY THE DOC TO BE "GANGS" SHOULD NOT ONLY NOT BE SUPPRESSED BUT SHOULD BE ENCOURAGED AS IT WOULD MAKE PRISON MUCH SAFER AND SECURE AND ENHANCE A PRISONERS CHANCE OF REHABILITATION VASTLY.
(I KOUTNIK AFFIDAVIT, MARCH 8D, 2005 ¶8, p3)

15) MANAGING GANG ACTIVITY REDUCES THE NUMBER OF VIOLENT INCIDENTS IN THE CORRECTIONAL SETTING. MANAGING GANG ACTIVITY IS CONDUCTED THROUGH EDUCATING STAFF, SEARCHING INMATES' PROPERTY AND LIVING AREAS, MONITORING TELEPHONE CONVERSATIONS AND MONITORING INCOMING AND OUTGOING MAIL (BROWN AFFIDAVIT OF FEBRUARY 15, 2005 ¶12, p.4)

RESPONSE NO. 15) DENY. MANAGING VIOLENT PEOPLE REDUCES THE NUMBER OF VIOLENT INCIDENTS. THIS TOO IS IRRELEVANT TO ANY ISSUE IN THIS ACTION BECAUSE NO "GANG" ACTIVITY OCCURRED OR WAS DISCUSSED IN PLAINTIFF'S LETTER.
(I KOUTNIK AFFIDAVIT, MARCH 8D, 2005 ¶9 p3)

16) ONE REASON INMATES ARE TRANSFERRED TO WSPF IS TO PROVIDE THEM WITH A FRESH ENVIRONMENT AWAY FROM GANG INFLUENCES AND OTHER ADVERSE

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No. 06-1171

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOSEPH D. KOUTNIK,

Petitioner,

v.

LEBBEUS BROWN, GERALD A. BERGE, and MATTHEW J. FRANK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 3, 2007

QUESTIONS PRESENTED

The petitioner, a Wisconsin prisoner, had a piece of outgoing mail confiscated. The mailing contained a drawing of a Swastika with a legend displaying three prominent, stylized upper-case letter Ks (KKK). The mailing also included a letter expressing a desire to merchandise the drawing in a form in which it could be reintroduced into the prison.

The two questions presented are:

(1) Did the Seventh Circuit correctly apply the standard set forth in *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974) and *Thornburgh v. Abbott*, 490 U.S. 401, 411-13 (1989) to the uncontroverted facts in the record?

(2) Is the confiscation of mail containing gang symbols supported by the legitimate penological interests of prison security and rehabilitation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION 4

A. The Court of Appeals' Application of *Martinez* Does Not Raise a Compelling Question 4

B. The Seizure of Koutnik's Mail Was Justified by the Valid Penological Interests of Security and Rehabilitation 7

1. The Judicial System Grants Broad Deference to Prison Administrators for the Implementation of Penological Goals 7

2. The Marketing of White Supremacist Symbols and Language from Inside the Prison Threatens Prison Security. 9

3. In Addition to Safety Concerns, the Seizure of Koutnik's Mail was Necessary to Achieve the Compelling State Interest in Rehabilitation. 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES CITED

Amatel v. Reno, 156 F.3d 192 (D.C. Cir. 1998).....11, 12

Beard v. Banks, ___ U.S. ___, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006).....9

Bell v. Wolfish, 441 U.S. 520 (1979).....8

Bell-Bey v. Williams, 87 F.3d 832 (6th Cir. 1996).....5

Block v. Rutherford, 468 U.S. 576, 82 L. Ed. 2d 438 8-9

Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993).....5

Herlein v. Higgins, 172 F.3d 1089 (8th Cir. 1999).....8

Johnson v. California, 543 U.S. 499 (2005).....7

Koutnik v. Brown, 2004 WL 2110746, 2004 U.S. Dist. LEXIS 19069 (W.D. Wis.).....3

Koutnik v. Brown, 2005 WL 1484593, 2005 U.S. Dist. LEXIS 12643 (W.D. Wis.).....3

Koutnik v. Brown, 456 F.3d 777 (7th Cir. 2006).....3, 5, 7, 12, 13

Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999).....11

Nasir v. Morgan, 350 F.3d 366 (3rd Cir. 2003).....5, 6, 7

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 8-9

Overton v. Bazetta, 539 U.S. 126 (2003) 9

Pell v. Procunier, 417 U.S. 817 (1974) 11

Procunier v. Martinez,
416 U.S. 396 (1974) ..... i, 4, 5, 6, 7, 8, 11, 12

Ramirez v. Pugh, 379 F.3d 122 (3rd Cir. 2004) 11, 12

Rios v. Lane, 812 F.2d 1032 (7th Cir. 1987),
cert. dismissed, 483 U.S. 1001 (1987) 9

Shaw v. Murphy, 532 U.S. 223 (2001) 7

Smith v. Delo, 995 F.2d 827 (8th Cir. 1993) 5, 6

Stow v. Grimaldi, 993 F.2d 1002 (1st Cir. 1993) 5

Thornburgh v. Abbott, 490 U.S. 401 (1989) ..... i, 4, 5, 8, 9

Treff v. Galetka, 74 F.3d 191 (10th Cir. 1996) 5

Turner v. Safley, 482 U.S. 78 (1987) 4, 5, 6, 7, 8, 9

Waterman v. Farmer, 183 F.3d 208 (3rd Cir. 1999) 11

Wilkinson v. Austin, 545 U.S. 209 (2005) 9, 10

Witherow v. Paff, 52 F.3d 264 (9th Cir. 1995) 5

STATUTES CITED

28 U.S.C. § 1915A 3

42 U.S.C. § 1983 3

CONSTITUTIONAL PROVISIONS CITED

First Amendment.....3, 4, 8

Due Process Clause.....3

OTHER AUTHORITIES CITED

Wis. Admin. Code § DOC 303.02(11).....1

Wis. Admin. Code § DOC 303.20(3).....1, 3, 12

STATEMENT OF THE CASE

The petitioner, Joseph D. Koutnik, is an inmate at the Wisconsin Secure Program Facility (WSPF), Boscobel, Wisconsin, and a member of the Simon City Royals, a "usually white" gang, that opposes the introduction of other races into their territories (R. 13:¶¶ 1, 62-64). In December 2002 he sent a letter to Northern Sun, a company that sells t-shirts, posters, and stickers, in his attempt to merchandise his drawing of a Swastika with a hand-drawn legend featuring three large, stylized capital Ks (R. 13:¶ 24). One of the respondents and prison gang expert Lebbeus Brown (R. 13:¶ 7-10), then a Lieutenant at WSPF, prevented the letter from being sent, and issued a "Notice of Non-Delivery of Mail" (R. 13:¶¶ 26-27). He informed Koutnik (R. 13:¶ 27) that the Swastika drawing violated Wisconsin Administrative Code DOC § 303.20(3), which provides as follows:

> (3) Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11) or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed, symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Brown averred in an affidavit that the Swastika has become a symbol of Aryan pride and white supremacy, as well as racial hatred (R. 13:¶ 13). Thus it is not allowed in Wisconsin Department of Corrections (DOC) institutions (R. 13:¶ 31). Similarly, Brown reasonably interpreted the

three capital Ks to be a reference to the KKK or Ku Klux Klan, reinforcing the symbolism of the Swastika drawing (R. 13:¶ 37).

White supremacist groups are not sanctioned by or approved to operate in WSPF (R. 13:¶ 36). Brown concluded that Koutnik, by attempting to send the drawing and accompanying letter to Northern Sun, was identifying with and trying to promote the growth of white supremacist groups while merchandising white supremacy material (R. 13:¶ 40).

Koutnik's letter to Northern Sun contained a request that the design be merchandised to prison inmates (R. 13:¶ 24). As a result, Brown concluded that Koutnik was attempting to use his outgoing mail to directly affect the safety of the prison system by his attempt to reintroduce his white supremacy drawing into the prison system, where it might be possessed by and circulated among other inmates (R. 13:¶ 40). Brown also determined that permitting such an activity would encourage inmates holding white supremacist beliefs to engage in racially-motivated disruptive behavior by associating WSPF with the merchandising of white supremacist materials (R. 13:¶¶ 42-43). As a result, Koutnik's outgoing mail was seized on December 30, 2002, and not delivered, because the attempt to merchandise white supremacy materials from inside the prison was incompatible with WSPF's duty to provide a safe and secure environment for all inmates, staff, and visitors. Additionally, the seizure of Koutnik's mail was related to the penological goal of rehabilitation (R. 13:¶ 49). Brown averred that rehabilitation efforts at WSPF include encouraging Koutnik to live crime-free upon release and to develop the ability to solve conflicts without resorting to violence (R. 13: ¶¶ 49-50). Another important rehabilitation goal is to encourage Koutnik to recognize that successful reintegration into society requires

respecting the rights of others (R. 13:¶ 50). According to Brown, merchandising white supremacy materials is incompatible with these rehabilitation goals (R. 13:¶ 51).

Koutnik brought his action under 42 U.S.C. § 1983. He mounted a facial challenge to § DOC 303.20(3), as overbroad and unconstitutionally vague. He also brought an as-applied challenge to the confiscation of his mailing, that this action violated his limited First Amendment free speech rights and rights under the substantive component of the Due Process Clause (R. 2). In its 28 U.S.C. § 1915A order, the district court denied the petitioner leave to proceed on his facial challenge to § DOC 303.20(3) and on his substantive due process claim (R. 3). *Koutnik v. Brown*, 2004 WL 2110746, 2004 U.S. Dist. LEXIS 19069 (W.D. Wis.). The district court subsequently granted summary judgment in favor of the respondents on the remaining free exercise claim (R. 36). *Koutnik v. Brown*, 2005 WL 1484593, 2005 U.S. Dist. LEXIS 12643 (W.D. Wis.). The court of appeals affirmed the judgment of the district court, holding that § DOC 303.20(3) was neither unconstitutionally overbroad, nor unconstitutionally vague. *Koutnik v. Brown*, 456 F.3d 777, 781, *et seq.* (7th Cir. 2006). In addition, the court of appeals expressed approval of the district court's handling of the substantive due process claim and held that the confiscation of the petitioner's mail did not violate the petitioner's limited free exercise rights; because this conduct furthered the important penological interest of rehabilitation. *Id.* at 781-82 n.2, 784, *et seq.*

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION

A. The Court of Appeals' Application of *Martinez* Does Not Raise a Compelling Question.

This Court's first landmark decision regarding First Amendment rights in the prison context was *Procunier v. Martinez*, 416 U.S. 396 (1974). The Court set two requirements for prison regulations that limited prisoners' First Amendment rights:

> First, the regulation or practice in question must further an important or substantial government interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413. Fifteen years later the Court decided *Thornburgh v. Abbott*, 490 U.S. 401 (1989), which replaced the *Martinez* standard with the reasonableness test promulgated in *Turner v. Safley*, 482 U.S. 78 (1987), when applied to in-coming mail, and also clarified the holding of *Martinez*. In regard to in-coming mail, the Court explained the proper interpretation of "necessary or essential" by stating:

> We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict "least restrictive means" test. As noted, *Martinez* required no more than that a challenged

> regulation be "generally necessary" to a legitimate government interest.

Thornburgh, 490 U.S. at 411.

Following *Thornburgh* there was a split among the circuits on the standard applied to out-going mail cases.[1] Most circuits apply the standard set out in *Martinez*. They are the First, Third, Sixth, Seventh, Ninth, and Tenth. *Stow v. Grimaldi*, 993 F.2d 1002 (1st Cir. 1993); *Nasir v. Morgan*, 350 F.3d 366 (3rd Cir. 2003); *Bell-Bey v. Williams*, 87 F.3d 832 (6th Cir. 1996); *Koutnik v. Brown*, 456 F.3d 777 (7th Cir. 2006); *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995); *Treff v. Galetka*, 74 F.3d 191 (10th Cir. 1996). Two circuits apply the *Turner* reasonableness standard. They are the Fifth and Eighth. *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993); *Smith v. Delo*, 995 F.2d 827 (8th Cir. 1993).

However, a close reading of the cases applying *Martinez* and those applying *Turner* indicates that the difference between the two standards is largely superficial. In *Martinez* the court required that mail restrictions (1) further an important government interest, such as security, order, or rehabilitation, and (2) be no broader than

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[1] Koutnik attempts to further divide the circuits that apply the *Martinez* standard into circuits that consider *Thornburgh* to have "restated" *Martinez* and circuits that view *Thornburgh* as having "preserved" *Martinez*, Pet. for Cert. at 12-14, but this difference is purely semantic. Several circuits have in fact reiterated the *Thornburgh* Court's statement that *Martinez* did not create a "least-restrictive means test." *See Bell-Bey v. Williams*, 87 F.3d 832 (6th Cir. 1996); *Nasir v. Morgan*, 350 F.3d 366 (3rd Cir. 2003); and *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995). However, Koutnik does not identify any post-*Thornburgh* cases in which circuit courts have applied a least-restrictive means test, indicating that the courts applying the "preserved" *Martinez* standard are applying it as modified by *Thornburgh* without an explicit statement that *Martinez* was clarified by *Thornburgh*.

"is necessary or essential" to protect the government interest. *Martinez*, 416 U.S. at 413. In *Turner*, the Court created a four-part test that seeks to determine: (1) whether a prison regulation is legitimate, neutral, and reasonably related to a legitimate government interest, (2) whether the plaintiff has an alternative means of exercising the rights asserted, (3) the impact the accommodation would have on prison operation, and (4) whether the presence of other alternatives undermines the reasonableness of the regulation. *Turner*, 482 U.S. at 89-90.

The two tests are extremely similar in application. The first prong of both tests asks whether there is a relationship between the prison regulation and a legitimate government interest. The latter portion of each test examines the strength of the relationship between the regulation and the government interest, either by asking whether it is "necessary or essential" or by asking if there are alternative means of either exercising the right or achieving the penological goal.

This similarity between *Martinez* and *Turner* has been recognized by two circuits. The Eighth Circuit began applying *Turner* to out-going mail cases only after stating:

> *Martinez* should be understood as striking down the regulation because it was not rationally related to a legitimate and neutral penological objective and because the regulation went further than necessary to serve valid governmental interests. This is not different from the analysis mandated by *Turner*.

Smith, 995 F.2d at 830. Similarly, in *Nasir* the Third Circuit began by applying *Turner* to an in-coming mail question and

then proceeded to apply *Martinez* to an out-going mail question, stating, "[m]uch of the discussion, therefore, that proceeded in the *Turner* analysis is relevant here." *Nasir*, 350 F.3d at 375. In light of the similarity between the two standards, the split between the circuits, to the extent that there is one, is not a compelling reason to grant certiorari.

It should be noted that the court of appeals in the instant matter rejected the respondents' argument that the courts should apply the *Turner* standard to out-going prisoner mail in light of this Court's indication in *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), that there is a unitary standard applicable to prisoners' constitutional claims. *Koutnik*, 456 F.3d at 784 n.4. Of course, the *Turner* standard does not apply to all prisoner claims. *See, e.g., Johnson v. California*, 543 U.S. 499, 509-511 (2005).

B. The Seizure of Koutnik's Mail Was Justified by the Valid Penological Interests of Security and Rehabilitation.

1. The Judicial System Grants Broad Deference to Prison Administrators for the Implementation of Penological Goals.

Koutnik asks the Court to grant a writ of certiorari to determine whether general rehabilitative goals alone can justify the seizure of outgoing mail. However, to the extent that Koutnik ignores the security concerns involved in this case he mischaracterizes the reason for the seizure of his mail. Further, by questioning the determination made by prison officials that restrictions on the use of symbols and language associated with white supremacist gangs are related to the safety or rehabilitation goals of the prison, Koutnik

asks the Court to take on a role it has traditionally been reluctant to fill.

In *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), this Court stated:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Similarly, in *Martinez*, this Court found the judicial system to be "ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Martinez*, 416 U.S. at 405. The judicial system is at a disadvantage in attempting to manage prisons because actions that are "seemingly innocuous" to people who do not work as prison administrators may have potentially significant implications for the operation of the prison. *Thornburgh*, 490 U.S. at 407. As a result, prison administrators are not required to prove harmful consequences, only an objectively rational connection. *Herlein v. Higgins*, 172 F.3d 1089, 1091 (8th Cir. 1999), citing *Turner*, 482 U.S. at 91-92. *See also Thornburgh*, 490 U.S. at 417. As the Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987), emphasized:

> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on . . . difficult and sensitive matters of institutional administration," *Block*

> *v. Rutherford*, 468 U.S. 576, 588, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984), for the determinations of those charged with the formidable task of running a prison.

See also Beard v. Banks, ___ U.S. ___, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697 (2006) (plurality opinion) (reiterating that "courts owe 'substantial deference to the professional judgment of prison administrators'" (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003))).

2. The Marketing of White Supremacist Symbols and Language from Inside the Prison Threatens Prison Security.

Security is central to all objectives of prison administration. *Thornburgh*, 490 U.S. at 415. Seizure of Koutnik's mail bore a logical connection to the provision of prison security by limiting the ability of an admitted gang member to market white supremacist material. There can be no doubt that suppressing any and all white supremacist gang activity is reasonably related to the valid penological goal of prison security. *See Turner*, 482 U.S. at 91-92. *See also Rios v. Lane*, 812 F.2d 1032, 1037 (7th Cir. 1987), *cert. dismissed*, 483 U.S. 1001 (1987). Prison gangs are the primary safety concern in the modern prison. *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005) ("Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls").

The petitioner is a member of the Simon City Royals, a "usually white" gang, which opposes the introduction of other races into their territories (R. 13:¶¶ 62-64). He was attempting to merchandise, through Northern Sun, his

drawing of a Swastika, a symbol of Aryan pride, white supremacy, and racial hatred, accompanied by a legend that was a coded reference to the Ku Klux Klan (R. 13: ¶¶ 13, 24, 37). White supremacist groups, including the Klan, are not sanctioned or approved by WSPF. Respondent Brown concluded that Koutnik, by attempting to market the drawing and in conjunction with the accompanying letter to Northern Sun, was identifying with and trying to promote the growth of white supremacy groups while merchandising white supremacy materials (R. 13:¶¶ 41-43).

WSPF's security interests were implicated, because allowing Koutnik to engage in the business of merchandising such material out of WSPF would imply that the DOC and WSPF condoned, or even promoted, white supremacist activity within the institution (R. 13:¶¶ 42-43). Brown felt that such a perception by inmates would lead to unrest and racial tension (R. 13:¶ 44). Race hatred and the violence associated with it are particular security concerns within the prison system (R. 13:¶ 45). *See Wilkinson*, 545 U.S. at 227. In addition, Koutnik's letter included a request that Northern Sun merchandise his drawing in a form that would be available to other inmates (R. 13:¶ 46). Thus his letter clearly contemplated that the drawing would be reproduced by Northern Sun in a form which would be reintroduced into the prison and would circulate among inmates within the prison system (R. 13:¶ 46). Respondent Brown concluded that allowing Koutnik to engage in merchandising white supremacy materials from within the prison would be incompatible with WSPF's duty to provide a safe and secure environment for all inmates, staff and visitors (R. 13:¶ 47).

3. In Addition to Safety Concerns, the Seizure of Koutnik's Mail was Necessary to Achieve the Compelling State Interest in Rehabilitation.

In addition to the vital prison safety interest at issue in this case, it is beyond question that rehabilitation is also a substantial government interest. *See Waterman v. Farmer*, 183 F.3d 208, 215 (3rd Cir. 1999) (finding the legitimacy of rehabilitation "beyond dispute"); *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) ("The legitimacy of the rehabilitative purpose appears indisputable"); *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) ("It is beyond question that both jail security and rehabilitation are legitimate penological interests"). Logically, "since most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). Therefore, "[p]rison administrators are responsible for . . . rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Martinez*, 416 U.S. at 404.

Koutnik attempts to find a split among the circuits on the issue of whether a broad definition of rehabilitation can constitute a valid penological interest. Pet. for Cert. at 12-16. This split is purportedly derived from the Third Circuit's decision in *Ramirez v. Pugh*, 379 F.3d 122 (3rd Cir. 2004), which disagreed with an aspect of the reasoning of *Amatel*, 156 F.3d at 199-200, in regard to the breadth of the state's penological interest in rehabilitation. However, the Third Circuit took issue with the *Amatel* decision only to the extent that that decision could be construed to define rehabilitation as "the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards

which the rehabilitative efforts are addressed." *Ramirez*, 379 F.3d at 128.

Even if this Court were to find a substantial split based on the *Amatel* and *Ramirez* decisions, the instant case is not the case to decide the issue. Koutnik's submission intended to be sent to Northern Sun was not confiscated for the general inculcation of "values." The letter was seized for the narrow reason that it used gang symbols in violation of Wisconsin Administrative Code DOC § 303.20(3), thus implicating the security and rehabilitation goals of WSPF.

Finally, although Koutnik claims that the seizure of his drawing and letter to Northern Sun has impeded his rehabilitation, Pet. for Cert. at 13, the court of appeals rightly came to the opposite conclusion. *Koutnik*, 456 F.3d at 785-86. Koutnik cites this Court's statement in *Martinez* that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Martinez*, 416 U.S. at 412. This statement, however, was rooted in two internal policy statements of the Federal Bureau of Prisons. The first stated: "Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process." *Id.* at 412 n.13 (internal quotation marks and citations omitted). The second statement found that: "Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community." *Ibid.* (internal quotation marks and citations omitted). The court of appeals concluded that, "[t]aken in that context, we believe that the Supreme Court's statement in *Martinez* actually supports the defendants' position here." *Koutnik*, 456 F.3d at 785. The court of appeals indicated that Koutnik's correspondence was not an effort to establish

"constructive, wholesome contact" with the outside community that would foster successful reintegration into society. *Ibid.* Instead, it was an effort to appeal to groups that would hinder, rather than foster, respectful human interaction, both inside and outside of prison. *Ibid.* As a result, the attempt to market a Swastika drawing with a KKK legend was obviously incompatible with the identified rehabilitation goals of living free of crime when the petitioner is released from custody, developing the ability to resolve crimes without violence, and "recogniz[ing] that successful reintegration into society requires respecting the rights of others" (R. 13: ¶ 11).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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July 3, 2007

(3)

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No. 06-1171

IN THE
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JOSEPH D. KOUTNIK,

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LEBBEUS BROWN, GERALD A. BERGE, AND MATTHEW J. FRANK,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 31, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

I. This Court Should Grant This Petition To Resolve The Circuit Split Over The Appropriate Standard Of Review To Apply To Claims Of Outgoing Prisoner Mail Censorship 1

A. The Cases Cited By Respondents Reflect A Minority View That Is Contrary To This Court's Precedent That *Martinez* And *Turner* Are Distinct 2

B. Respondents' Assertion That *Martinez* And *Turner* Are "Extremely Similar In Application" Ignores The Substantial Difference Between "Rational Basis" Review And "Intermediate Scrutiny." 3

II. This Court Should Grant This Petition To Resolve Whether The State May Censor Outgoing Prisoner Mail Based On Its View That The Mail's Content Is Inconsistent With The State's General Rehabilitation Goals. 5

A. The Seventh Circuit Decision Contradicts *Martinez*, Which Does Not Permit Censorship Of Outgoing Prisoner Mail Because Its Content Is Merely Inconsistent With General Rehabilitation Goals. 6

B. This Court Should Not Abstain From Reviewing This Important Question Out Of Deference To Prison Officers Or Unsupported Security Concerns. 6

CONCLUSION 7

TABLE OF AUTHORITIES

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947) 7

Agostini v. Felton, 521 U.S. 203 (1997) 3

Amatel v. Reno, 156 F. 3d 192 (D.C. Cir. 1998) 4

Beard v. Banks, 126 S. Ct. 2572 (2006) 3-4

Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989) 4

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) 4

Nasir v. Morgan, 350 F. 3d 366 (3d Cir. 2003) 2

Overton v. Bazzetta, 539 U.S. 126 (2003) 3

Procunier v. Martinez, 416 U.S. 396 (1974) ..... *passim*

State Oil Co. v. Khan, 522 U.S. 3 (1997) 3

Thornburgh v. Abbott, 490 U.S. 401 (1989) ..... *passim*

Turner v. Safley, 482 U.S. 78 (1987) ..... *passim*

Waterman v. Farmer, 183 F. 3d 208 (3rd Cir. 1999) 4

ARGUMENT IN REPLY

In their Brief in Opposition, Respondents concede that the Courts of Appeals are in clear conflict about the appropriate standard of review for censorship of outgoing prisoner mail. Opp. at 5. Respondents also concede that a substantial controversy exists over whether censorship of outgoing prisoner mail can ever be justified in the name of general inmate rehabilitation. Opp. at 11. On both questions presented, Respondents' arguments merely highlight the reasons this Court should grant, not deny, this Petition.

I. This Court Should Grant This Petition To Resolve The Circuit Split Over The Appropriate Standard Of Review To Apply To Claims Of Outgoing Prisoner Mail Censorship.

The first question presented by Petitioner is whether, and to what degree, this Court's opinion in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), preserved, reversed, or modified the First Amendment standard of review established in *Procunier v. Martinez*, 416 U.S. 396 (1974), in the context of state censorship of outgoing prisoner mail. Petitioner has identified a substantial circuit split on this question. Pet. at 9-11. Some courts believe that *Thornburgh* implicitly reversed *Martinez*, even in the outgoing prisoner mail context. *Id.* at 9-10. These courts apply the "reasonableness" standard set forth in *Turner v. Safley*, 482 U.S. 78 (1978). Pet. at 9-10. Other courts hold that *Thornburgh* preserved the *Martinez* standard of review for outgoing prisoner mail. Pet. at 10-11.

Respondents' arguments fail to acknowledge that *Martinez*, which established "intermediate scrutiny" as the standard of review for prisoners' claims of outgoing mail censorship, is still fundamentally distinct from *Turner*, which established "rational basis" review for speech restrictions within prison walls.

A. The Cases Cited By Respondents Reflect A Minority View That Is Contrary To This Court's Precedent That *Martinez* And *Turner* Are Distinct.

While conceding the existence of this circuit split, Respondents attempt to downplay its significance, claiming that "a close reading of the cases applying *Martinez* and those applying *Turner* indicates that the difference between the two standards is largely superficial." Opp. at 5. Citing to language from a Third Circuit and an Eighth Circuit decision, Respondents contend that this circuit split is not a "compelling" reason to grant certiorari. *Id.* at 7.[1]

Respondents cite, however, to only one side of the circuit split. Several circuits, including the First, Sixth, Ninth, and Tenth Circuit Courts of Appeals, continue to apply *Martinez* as a distinct standard to claims of censorship of outgoing prisoner mail. Opp. at 5; Pet. at 10-11. Respondents concede that the decisions that they cite conflict directly with the decision in this case, where the Seventh Circuit "rejected respondents' argument that the court should apply the *Turner* standard to out-going prisoner mail." Opp. at 7.

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[1] The Third Circuit case, *Nasir v. Morgan*, 350 F. 3d 366 (3d Cir. 2003), involved a challenge to a prison policy regulating inmate correspondence with former prisoners. *Id.* at 368-69. The Third Circuit first determined the standard of review, concluding that *Thornburgh* preserved *Martinez* for outgoing mail. *Id.* at 370. The Court reviewed the policy on incoming mail under *Turner*, and then reviewed the policy on outgoing mail under *Martinez*. *Id.* at 371. Although the Court noted in its *Martinez* discussion that "much of the discussion, therefore, that proceeded in *Turner* is relevant here," the Court still performed the substantial, additional analysis concerning whether the policy was "narrowly drawn" and "no greater than necessary or essential" under *Martinez*. *Id.*

Moreover, the decisions cited by Respondents also conflict with *Martinez* and *Thornburgh*, impermissibly so. Courts of Appeals must follow this Court's precedent and may not conclude that more recent Supreme Court cases "have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). It remains this Court's sole prerogative to overrule its own precedent (although *Martinez* should *not* be overruled). *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Respondents' argument that the existing circuit split should be disregarded as "superficial" is based on their flawed assumption that *Martinez* could be rendered obsolete by lower courts.

B. Respondents' Assertion That *Martinez* And *Turner* Are "Extremely Similar In Application" Ignores The Substantial Difference Between "Rational Basis" Review And "Intermediate Scrutiny."

Respondents argue that the *Martinez* and *Turner* tests are "extremely similar in application" because the "first prong of both tests asks whether there is a relationship between the prison regulation and a legitimate government interest." Opp. at 6. Respondents assert that the "latter portion of each test examines the strength of the relationship between the regulation and the government interest." *Id.* Aside from this asserted facial resemblance, however, the two tests ask fundamentally different questions.

Turner provides for "rational basis" review. *See Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). The first *Turner* factor states that a regulation is justified where the government can show a "valid, rational connection" between the prison regulation and the legitimate penological interest. 482 U.S.

at 89.[2] Other courts have also noted the similarity between *Turner* and "rational basis" review. *See Waterman v. Farmer*, 183 F. 3d 208, 215 (3d Cir. 1999) (describing the *Turner* test as "similar to rational-basis review.") (Alito, C.J.); *Amatel v. Reno*, 156 F. 3d 192, 198-99 (D.C. Cir. 1998) (observing that *Turner* is "if not identical, something very similar" to rational basis review).

Martinez provides for "intermediate scrutiny." The second prong of *Martinez* provides that restrictions on outgoing prisoner mail are permitted only where they are "no greater than is necessary or essential" to advance legitimate penological interests. Pet. at 7. This Court has "repeatedly stated" that such language denotes the "intermediate scrutiny" standard of review. *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 476-77 (1989). For example, in *Central Hudson Gas & Electric Corp.*, 447 U.S. 557 (1980), this Court described intermediate scrutiny as requiring evidence that a speech restriction is "not more extensive than is necessary to serve that interest." *Id.* at 566. As the district court in this case noted, this "intermediate scrutiny" standard for commercial speech restrictions is "strikingly similar to the standard announced in *Martinez*." Pet. App. at 25a (citing *Central Hudson*).

Although "intermediate scrutiny" is not a "least-restrictive means" test, this Court has observed that it is still "far different . . . from the 'rational basis' test." *Fox*, 492 U.S. at 480. Under "rational basis" review, "it suffices if the law could be thought to further a legitimate governmental goal,

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[2] This Court recently recognized that "the second, third, and fourth factors," which Respondents assert are the limiting portions of *Turner*, "add little, one way or another, to the first factor's basic logical rationale." *Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006).

without reference to whether it does so at inordinate cost." Id. (emphasis added). Conversely, "intermediate scrutiny" requires "the cost to be carefully calculated." *Id.*

In this case, while the Seventh Circuit ostensibly applied the *Martinez* standard of review, it failed to apply the second *Martinez* prong, and thus provided only "rational basis" review. Pet. at 11-12. This hybrid or half-*Martinez* approach only exacerbates the confusion among the courts. Respondents' argument in defense of the Seventh Circuit—that "in application," the boundaries between the two distinct standards of *Turner* and *Martinez* are becoming blurred—reveals the confusion in the Courts of Appeals as to whether, and to what degree, *Thornburgh* preserved, modified, or reversed the *Martinez* standard. It is a reason to grant, not deny, this Petition.

II. This Court Should Grant This Petition To Resolve Whether The State May Censor Outgoing Prisoner Mail Based On Its View That The Mail's Content Is Inconsistent With The State's General Rehabilitation Goals.

As for Petitioner's second question, Respondents concede that the Third Circuit and the D.C. Court of Appeals are in direct conflict about whether the First Amendment permits content-based censorship in furtherance of a general interest in inmate rehabilitation. Pet. at 14 - 15. Respondents do not defend the original basis for the Seventh Circuit's opinion. Instead, Respondents argue that this Court should abstain from reviewing Petitioner's claim out of deference to prison administrators. Opp. at 7-8. Respondents also raise the rejected claim that allowing Petitioner's correspondence would have been detrimental to institutional security. Opp. at 9-10. Neither position has any merit.

A. The Seventh Circuit Decision Contradicts *Martinez*, Which Does Not Permit Censorship Of Outgoing Prisoner Mail Because Its Content Is Merely Inconsistent With General Rehabilitation Goals.

The Seventh Circuit held that the censorship was permissible because prison officials deemed the content of Petitioner's letter to be insufficiently "constructive" or "wholesome." Pet. App. at 13a. This ruling reflected Officer Brown's original justification, that allowing Petitioner to "merchandize his design was . . . incompatible with the facility's efforts to rehabilitate him." Pet. App. at 3a; Opp. at 10.

Allowing the censorship of outgoing prisoner mail because the State deems its content to be insufficiently "constructive" or "wholesome," or because it is otherwise "incompatible" with the State's general rehabilitation goals, would allow the censorship of the very speech protected in *Martinez*, which struck down a policy generally authorizing the censorship of outgoing mail containing "inflammatory political, racial, religious, or other views" or "otherwise inappropriate" content. Pet. at 12-13. In their Brief, Respondents fail to address this contradiction, choosing to simply repeat the Seventh Circuit's flawed analysis, almost word-for-word. *Compare* Opp. at 12-13 *with* Pet. App. at 12a-13a.

B. This Court Should Not Abstain From Reviewing This Important Question Out Of Deference To Prison Officers Or Unsupported Security Concerns.

Respondents argue that this Court should abstain from reviewing this important question out of broad deference to prison officers. Opp. at 7-8. Although some deference may be accorded to determinations made in the day-to-day administration of prisons, this policy of deference is not a

broad "hands off" posture towards prisoners' Constitutional claims. *See Martinez*, 416 U.S. at 406 (noting and rejecting the "hands off posture" of lower courts); *see also Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.")

Respondents attempt to bolster their call for deference to prison officials by introducing an alternative basis for censorship: the State's broad interest in institutional security. Opp. at 9-10. But this Court has already concluded that outgoing correspondence "cannot reasonably be expected to present a danger to the community *inside* the prison" merely because it "contains inflammatory racial views." *Thornburgh*, 490 U.S. at 411-12. Citing *Thornburgh*, the District Court specifically rejected Respondents' argument that Petitioner's correspondence with a retail catalog presented any plausible security threat to the WSPF prison environment. Pet. App. at 29a-30a. Respondents' reassertion of this same "security" rationale is merely an effort to dodge the question actually framed by the decision below: whether the First Amendment permits a prison officer to censor outgoing mail in furtherance of general inmate rehabilitation. It is not a basis to deny the Petition.[3]

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, this Court should grant Joseph D. Koutnik's petition for writ of certiorari.

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[3] Even if this Court were persuaded that this alternative "security" justification had merit, the appropriate response would be for this Court to grant the Petition and remand, not to deny it outright. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947).

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